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# Indiana Law Review



Volume 33 No. 3 2000

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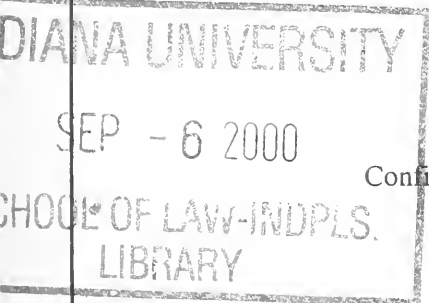
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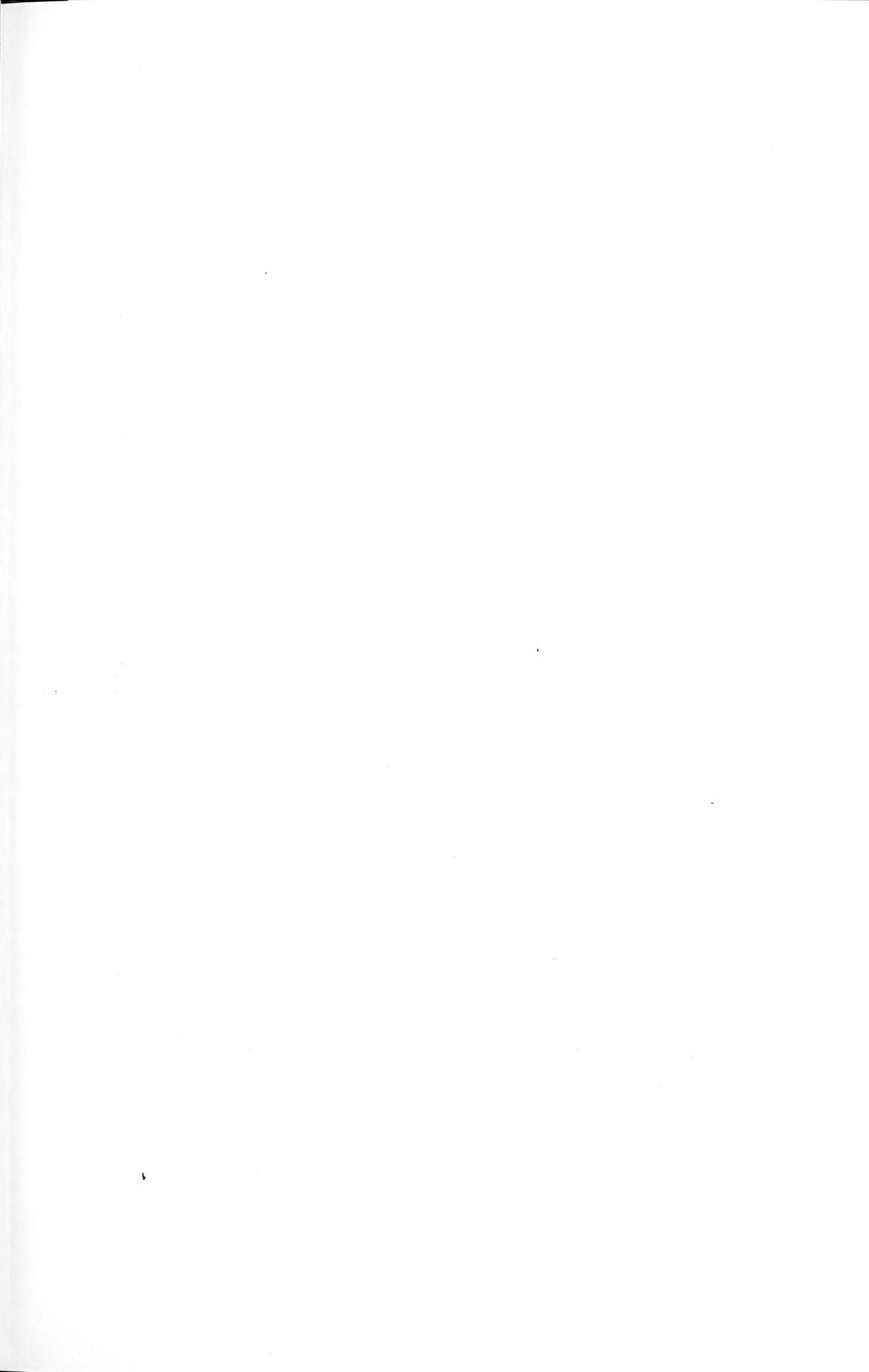
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CUSTODY AND COUVADE: THE IMPORTANCE OF PATERNAL BONDING IN THE LAW OF FAMILY RELATIONS

GEOFFREY P. MILLER\*

*“Il se met au lit quand sa femme est en couche”*<sup>1</sup>

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Among the Indian tribes of Guiana, the father, upon birth of a child, takes to his hammock as if he were ill and receives the condolences and congratulations of friends. New fathers of the South American Abipone tribe huddle among mats and skins, abstaining from food.<sup>2</sup> Among the New Guinea highlanders, men restrict their activities and refrain from hard labor.<sup>3</sup> In other cultures, men go

\* Professor of Law, New York University Law School. B.A., 1973, Princeton University; J.D., 1978, Columbia University. For suggestions, comments, and criticism, I would like to thank Amy Adler, Mary Anne Case, and Oscar Chase.

1. Traditional French saying, “[H]e takes to his bed when his wife is in labor,” quoted in WARREN R. DAWSON, THE CUSTOM OF COUVADE 12 (1929).

2. See LILLIAN EICHLER, THE CUSTOMS OF MANKIND, WITH NOTES ON MODERN ETIQUETTE AND THE NEWEST TREND IN ENTERTAINMENT 614 (1924).

3. See Anna Stokes Meigs, *Male Pregnancy and the Reduction of Sexual Opposition in a New Guinea Highlands Society*, 15 ETHNOLOGY 393-407 (1976).

into mock labor along with their wives.<sup>4</sup> These customs, denominated by anthropologists as "couvade," are found in many pre-industrial cultures, and may have developed spontaneously, rather than being transmitted by cultural diffusion.<sup>5</sup> They seem to reflect something important about the relationship between men and procreation.

Although couvade customs are absent in industrialized cultures, a related phenomenon remains. In nearly all societies a significant percent of men display pregnancy-like symptoms when their mates are expecting a child—weight gain, nausea, irritability, indigestion, and so on. This "couvade syndrome" is both well-documented and perplexing. Why should men experience sympathetic pregnancies?

As couvade customs attest, men have experienced reactions to procreation since time immemorial. In the last decades of the Twentieth Century, however, technological changes have enhanced men's potential for involvement in procreation. Advances in medical science have enhanced men's role in conception itself through participation in contraception and involvement in assisted reproduction procedures. During pregnancy, men now have much greater access to the fetus through amniocentesis, chorionic villum sampling, and sonographic imaging. Expectant fathers are participating in childbirth classes as "coaches" to their wives or girlfriends. They attend labor and delivery, and hold their newborns within minutes of birth. During infancy, men bottle feed their children and help with breast feeding. Men, moreover, enjoy parental leave rights and often have flexible work schedules that enhance their nurturing and care-taking capacities.

American culture has tended to discount or ignore men's capacity and need for involvement in conception, pregnancy, childbirth, and infant care. Prior to 1980, there were virtually no scientific studies on fatherhood. Procreation was seen as the province of mothers and medical personnel. Beginning in the 1980s, however, the cultural blinders began to lift, partly as a result of the influence of feminist studies throughout the social sciences.<sup>6</sup> Fatherhood became an issue for the culture, instead of an assumption. Over the past twenty years, psychologists, psychoanalysts, sociologists, anthropologists, physicians, nurses, and historians—among others—have investigated the male procreative role from a variety of theoretical perspectives. Running through this literature is a common theme: the importance of paternal bonding.<sup>7</sup> This new understanding of the

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4. See WARREN R. DAWSON, *THE CUSTOM OF COUVADE* 1 (1929).

5. Couvade rituals have been observed in tribal cultures all over the world, with the exception of Australia. See Lennart Y. Bogren, *Couvade*, 68 ACTA PSYCHIATRICA SCANDINAVICA 55, 56 (1983).

6. See Katharyn Antle May & Steven Paul Perrin, *Prelude: Pregnancy and Birth*, in DIMENSIONS OF FATHERHOOD 68-69 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985) (research on the father's role in procreation began during the 1970s as a result of feminist insights and the popularity of prepared childbirth classes).

7. In its technical form, "bonding" means a "unique relationship between two people that is specific and endures through time." MARSHALL H. KLAUS & JOHN H. KENNEL, *BONDING: THE*



father's role recognizes the power of the man's emotional connection with his offspring, and the profound reorientation of self that a man experiences when he assumes the role of "father."

The remarkable growth of knowledge about fatherhood and the male role in procreation has not, to date, filtered into American law or legal scholarship. Instead, judicial decisions and academic commentary reflect an anachronistic model grounded in questionable stereotypes of masculinity. These stereotypes paint the male role in procreation as minimal: the man makes a brief appearance at conception and then retires to a safe distance until after birth, when he gradually re-enters the picture and, over a period of years, develops a relationship with his children.

In this Article, I argue for a re-conceptualization of early paternal bonding in the law of family relations.<sup>8</sup> Drawing on recent scholarship in the social sciences, I argue that the capacity for paternal bonding in both of its aspects—relatedness to the fetus or infant, and adjustment of the concept of self into the paternal role—has not been fully appreciated in the legal treatment of abortion rights, adoption of children born out of wedlock, and adjudication of custody and visitation in divorce. Each of these areas could profit from a better understanding of the importance of paternal bonding in pregnancy and early childhood.

Part I of this Article discusses the traditional concept of the "minimal father"—the view of the man's role in procreation that pervaded American culture during the middle of the Twentieth Century and that still influences popular attitudes today. Part II traces the male experience of procreation through contraception, conception, pregnancy, abortion, perinatal death, labor and delivery, and early childhood care. Part III examines legal controversies in three areas: the expectant father's role in abortion, rights of unwed fathers in adoption, and issues related to custody and visitation. The Article ends with a brief conclusion.

## I. TRADITIONAL VIEWS OF FATHER-CHILD BONDING

For many years, and to some extent even today, a popular assumption had it that fathers play only a minimal role in pregnancy, childbirth, and infant care. This assumption seems to reflect cultural attitudes of earlier generations in the United States and elsewhere, when men were largely excluded from the circle of

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BEGINNINGS OF PARENT-INFANT ATTACHMENT 2 (1983). Stated from the perspective of a person's internal experience, the term denotes some relatively powerful connection between self and object, or a reorientation of the self that makes such an object relation possible.

8. I treat only the issue of bonding during conception, pregnancy, birth, and the first few months of the baby's life. I deal with later childhood only insofar as the issues in dispute relate to bonding during this period of pregnancy and early childhood. I also do not address the question David Chambers raised in 1984, as to whether fathers who had not previously served as primary parent can competently assume that role if granted custody in divorce. See David L. Chambers, *Rethinking the Substantive Roles for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

intimacy surrounding procreation. For many men, those conditions no longer reflect reality: men play an active role throughout the procreative experience. Nevertheless, the cultural stereotype of the distanced father continues to exert sway.

If we examine images of pregnancy and childbirth during early post Second World War period, we find a set of values, myths, and narratives that have influenced the way in which procreation is conceived and treated by the culture. The effect of this social script was to separate men and women in the procreative process, and to leave men (other than male doctors, who had a special dispensation) out of the cycle of information and decision. Pregnancy and childbirth were a woman's domain.

This cultural script included distinctive rituals for different stages of pregnancy. The first ritual was the Announcement, which took its classic form during the first pregnancy. The tradition was that the woman would notice a missed period and suspect that she might be pregnant. Husbands, who didn't make a habit of tracking their wives' menstrual cycles, would usually be unaware. Often, the wife wouldn't tell the husband of the missed period, either out of modesty or because she didn't want to raise false hopes. She would go to the doctor while he was at work. When the happy news came back, she would disclose it to her husband in some special setting, knowing that this moment would be something they would look back on in future years. The Announcement may not have taken the form of Gabriel's trumpet or a star in the heavens, but for each couple, it was a profound and defining event. The husband's scripted response was to radiate joy and confusion, and to look on his wife in a new way—not as sexual object, but rather as a mother to his future children. His role was then to bask in his potency and to work hard at being a "good provider."

These cultural rituals are illustrated in the story of Lucy Ricardo's pregnancy and the birth of "Little Ricky," which aired on *I Love Lucy* in 1952-53. In the episode, "Lucy is Enciente,"<sup>9</sup> an obviously pregnant Lucy complains to her friend Ethel that she's feeling "all dragged out in the morning" and that she's been "putting on a lot of weight." When Ethel suggests that she might be "going to have a baby" (the word "pregnant" is never spoken; even the title of the episode substitutes the Spanish as a euphemism), Lucy dismisses the idea (leaving the audience to conclude that Lucy must be oblivious to her own menstrual cycle!). Without telling Ricky, on the ground that she doesn't want to worry him, Lucy sees a doctor and finds that she is indeed expecting. She says: "All my life I dreamed about how I was going to tell my husband when we were going to have a baby . . . 'Ricky, darling, our dream has come true. You and I are going to be blessed with something that means more to us than anything in the whole world.'" A series of misadventures delays the realization of Lucy's dream, but the news finally comes out as Ricky is performing his act at the Tropicana Club. Lucy, who is sitting alone at a table near the bandstand, seems both part of this

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9. *I Love Lucy: Lucy is Enciente* (CBS television broadcast, Dec. 8, 1952) (available at the Museum of Television and Radio, New York).

environment and distinct: one can almost sense her abstraction from the excitement of Ricky's world and her increasing focus on her body and on the fetus growing there. Ricky, acting out the cultural script, inadvertently discloses how he will see his wife from this moment forward: he tells the audience, "I want you to meet my mother—I mean, my wife, my wife!" Even though he is flustered, he is also centered in his masculine role, as befits a husband who has just received confirmation of his potency: virile, handsome, and belting out *Lady in Red* to an appreciative crowd.

According to the traditional script, the woman would become increasingly centered in her body as her pregnancy progressed.<sup>10</sup> She would be gripped by deep calm and happiness. Her thoughts would concern the future that she was "expecting." This focus on the anticipated event was reinforced through social rituals. Baby showers made the mother-to-be feel special but also reinforced the sense that she now was living for someone else; the gifts would usually be baby blankets, diapers, formula, and so on. As she approached her term, she would begin to receive deference in ordinary interactions. Whereas as a young woman she might not expect anyone to give up a seat on a bus or subway, she now found herself regularly receiving such offers. Meanwhile, acquaintances and even strangers felt entitled to speak with her about her pregnancy, asking her when she was due, telling her of their own experiences, and so on. Her whole social environment changed.

For men, few of these rituals occurred. Expectant fathers were usually uninformed about the physiological changes that were occurring to their wives. They would not accompany their wives to the obstetrician. Especially if they were first time fathers, they would not know what to expect from the pregnancy. They might not know the due date. They had little concept of labor and delivery. They did not receive baby showers and were not even invited to their own wives' showers. Their physical appearance did not change much, and they would not receive any particular deference or acknowledgment (other than ribbing from buddies). They were expected to carry out their good provider role at the workplace and to return home reliably in order to help manage their wives' "delicate condition." This might mean trips to the delicatessen to gratify food cravings (Ricky gets Lucy a dill pickle and a mango milkshake)—chivalric quests that signaled his wish to be a father even though he didn't really know what was involved. According to the script, what men did know, but might not admit, was that they hoped for a boy. Men dreamed of teaching their boys the ways of masculinity and of living vicariously through their sons' athletic prowess, just as mothers thought of sharing feminine intimacies with a daughter. In *I Love Lucy*, Ricky, hoping for a son, brings home a football and boxing gloves; Lucy buys a

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10. As D.W. Winnicott puts it, "[T]he direction of her interest turns from outwards to inwards. She slowly but surely comes to believe that the center of the world is in her own body." KLAUS & KENNEL, *supra* note 7, at 8 (quoting Winnicott). In *I Love Lucy*, this process is symbolized by Lucy's centering herself on the living room couch and knitting. See *I Love Lucy: Lucy Hires an English Tutor* (CBS television broadcast, Dec. 24, 1952) (available at the Museum of Television and Radio, New York).

ballet skirt.

The climax of the pregnancy narrative in post-war American culture was labor and delivery. As the blessed event approached, the mother-to-be was supposed to pack a bag and leave it near the front door where it would not be forgotten. When her labor pains came on, she would somehow “know” it was time to go to the hospital. Her husband would rush her across town, spurred by fear that she would give birth in the back seat of the station wagon. Once at the hospital, he would kiss her goodbye in the main waiting room and watch her being escorted to the lying-in area. Often, he’d return to work and await the news over the telephone. If he did stay at the hospital, he would be barred from the labor and delivery rooms, being relegated instead to a “father’s waiting room,” where he would pace the floor, smoke, drink bad coffee, ineffectually attempt conversation with other men, and leaf through dog-eared copies of *Reader’s Digest*. The architecture of the father’s waiting room symbolized the role assigned to fathers: typically, the room would be separated from the lying-in part of the hospital by a large pane of glass. The father would hear about the birth from a nurse who would convey the two pieces of information that really mattered: the baby’s sex and health. A nurse would display the swaddled newborn from behind the viewing glass; the father could look, but could not touch. At first sight of his baby, he would experience an overpowering mixture of elation and confusion, a sense of being both powerful and powerless at the same time.

These stereotypes are explored in the classic *I Love Lucy* episode about the birth of Little Ricky.<sup>11</sup> A forbidding nurse sends the anxious Ricky to the men’s waiting room, where his tension contrasts with the complacency of the other expectant father, Mr. Stanley, a man whose enthusiasm for fatherhood has been dimmed by the fact that his wife’s six previous pregnancies all resulted in girls.<sup>12</sup> Ricky performs the rituals of pacing, smoking, leafing through magazines, and feebly attempting to converse with Mr. Stanley. Eventually he returns from the emasculating milieu of the lying-in hospital to a reassuring terrain of male competence and strength: the Tropicana, where a male chorus of musicians awaits him. He’s doing a voodoo number in war paint and a tribal wig. He’s savage, primal, resembling nothing so much as that “large primitive being covered with hair down to his feet” that Robert Bly claims lies at the bottom of every man’s psyche.<sup>13</sup>

When the call comes in, Ricky rushes to the hospital and is nearly arrested by a policeman who thinks that he might be deranged. A nurse brings Little Ricky out for viewing through the window of the father’s waiting room. Ricky, who’s at the back, can’t see past the others who are crowding around. He slowly

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11. *I Love Lucy: Lucy Goes to the Hospital* (CBS television broadcast, Jan. 19, 1953) (available at the Museum of Television and Radio, New York).

12. In a subplot, Mr. Stanley’s blasé attitude is shattered when the nurse tells him that this time he did not have a girl; he’s temporarily delirious with joy until he finds out that what the nurse means is that he’s had triplets—all girls. See *id.*

13. ROBERT BLY, *IRON JOHN* 6 (1990).

approaches the viewing window—and faints dead away from the emotion of seeing his firstborn son. The scene captures both the new father's atavistic sense of masculine validation (symbolized by Ricky's tribal costume and war-paint), and his equally powerful feeling of being overwhelmed and out of control (symbolized by his collapse at the mere sight of Little Ricky through a glass partition).

During the extended hospital stay, which would last up to three days, the father would go to work, visit the mother and baby in the hospital, and go home. An older female relative might stay over during this time to care for the father and to prepare the house for the arrival of mother and baby. The father would hand out cigars to male colleagues and friends. The symbolism of the cigar is hard to miss at one level: even if, as Freud said, sometimes a cigar is just a cigar, in the case of a father announcing the birth of his child, the phallic implications are hard to gainsay. The act had other meanings as well: it signaled the father's potency, but also symbolized his minimal involvement in procreation. The man inseminated the woman and nine months later handed out cigars in a ritual display, but what happened in between was not his department.

After the birth of the child, the father was supposed to return to his usual schedule. During the first few months, a nurse or grandmother might live in the house and help out. The husband would provide what help he could, but mostly he would expect to go on as before, or even work harder in his good provider role in order to bring in the extra income that the baby's arrival demanded. The mother, meanwhile, would abandon her former activities and devote herself full time to the care of the baby. Over time, the father would take more of an interest in the child, especially when he or she learned to talk. But even then, during the early years of childhood, the father would be more distant than the mother: he would be the dad of *Father Knows Best*—kind, firm, authoritative, occasionally indulgent and somewhat austere, but never deeply warm or intimate.

## II. THE FATHER'S CAPACITY FOR CONNECTION WITH THE FETUS AND NEWBORN

The traditional American stereotype of the minimal father underestimated the importance of men's involvement in procreation. The fact is that men are not minimally involved in procreation. They have a highly developed capacity for bonding with their children and for adjusting their self-concept to include a paternal role. Paternal bonding has been part of the human condition at least since people realized that men are necessary for procreation.<sup>14</sup> Added to this apparently innate capacity for bonding, in recent times, is the impact of technology, which has provided unparalleled opportunities for men to become emotionally involved in procreation. This Part addresses the role of

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14. When knowledge of physiological paternity is absent, the paternal bond appears to be weaker. See BRONISLAW MALINOWSKI, *THE FATHER IN PRIMITIVE PSYCHOLOGY* 12 (1927) (because Trobriand Islanders were ignorant of the male role in procreation, men had "no bond of union whatever" with their children).



contemporary men in the various stages of procreation: contraception, conception, pregnancy, abortion, perinatal death, labor and delivery, and infant care.

### A. Contraception

Men play a role in contraception.<sup>15</sup> Most obviously, they participate in abstinence. Men also have principal responsibility for withdrawal, a technique that depends on the man's self-control and responsibility.<sup>16</sup> Some contraceptive technologies also require the man's participation.<sup>17</sup> Condoms are usually his responsibility: it is usually his job to obtain, store, and properly use these devices.<sup>18</sup> The diaphragm has traditionally been the woman's preserve, but men are aware of the technology because the woman may need to break off a sexual encounter in order to insert it and because an improperly positioned diaphragm may interfere with sex. A man might also assist by applying spermicide or inserting the diaphragm for the woman. The birth control pill and the intrauterine device, on the other hand, limit a man's involvement in contraception. Male responsibility would increase, however, if a male birth control pill enters the market.

Both men and women can prevent pregnancy through sterilization. For men, the procedure is a vasectomy. The surgeon incises the scrotal sac and blocks the sperm ducts so that sperm does not enter the semen.<sup>19</sup> For women, the

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15. See NORMAN E. HIMES, *MEDICAL HISTORY OF CONTRACEPTION* (1936); ANGUS MCLAREN, *A HISTORY OF CONTRACEPTION: FROM ANTIQUITY TO THE PRESENT Day* (1990); WILLIAM MARSIGLIO, *PROCREATIVE MAN* 32 (1998); Sharon R. Edwards, *The Role of Men in Contraceptive Decision-Making: Current Knowledge and Future Implications*, 26 *FAM. PLAN. PERSP.* 77 (1994).

16. See Deborah Rogow & Sonya Horowitz, *Withdrawal: A Review of the Literature and an Agenda for Research*, 26 *STUD. IN FAM. PLAN.* 140, 144 (1995) (practice "requires a man to maintain awareness of when he is about to ejaculate and to withdraw his penis from his partner's vagina prior to doing so").

17. See Edwards, *supra* note 15, at 77.

18. Condom use declined with the introduction of the birth control pill and the intrauterine device in the 1960s, see Koray Tanfer et al., *Condom Use Among U.S. Men, 1991*, 25 *FAM. PLAN. PERSP.* 61, 61 (1993), but have returned to popularity during the AIDS crisis. See John S. Moran et al., *Increases in Condom Sales Following AIDS Education and Publicity, United States*, 80 *AM. J. PUB. HEALTH* 607-09 (1990); Tanfer et al., *supra*. Although women are taking a more active interest in condom use, the device is still largely a male responsibility. See John E. Anderson et al., *Condom Use for Disease Prevention Among Unmarried U.S. Women*, 28 *FAM. PLAN. PERSP.* 25 (1996); Vaughn I. Rickert et al., *Adolescents and AIDS: Females' Attitudes and Behaviors Toward Condom Purchase and Use*, 10 *J. ADOLESCENT HEALTH CARE* 313 (1989). Fathers traditionally hid condoms among their personal effects where, if they were found by children, they would symbolize the mystery of his potency.

19. See John L. Pfenninger, *Preparation for Vasectomy*, 30 *AM. FAM. PHYSICIAN* 177 (1984).



sterilization procedure of choice is tubal ligation, a cutting, tying, or blocking of the fallopian tubes.<sup>20</sup> When the woman is sterilized, the man has less of an involvement, but he may participate in her decision to become sterilized and may provide emotional and logistical support during the procedure.

### *B. Conception*

Men have played a socially recognized role in conception in every culture that understands physiological fatherhood. However, that role has tended to be both brief and thoroughly subsumed in the society's construction of sexuality. Because conception is not observable or immediately verifiable, and because a high percentage of ejaculations do not cause pregnancy, human cultures have not found a means to ritualize the event for ordinary people. However, modern technologies, most of them introduced during the past generation, have partially overcome these limitations. Conception can be detected quickly and can be manipulated by doctors. One consequence is that men can participate in procreation from the outset of pregnancy. In the process, they can experience early feelings of connection with the fetus and with their paternal role.

The widespread availability of cheap, reliable home pregnancy tests brings the man much more into the action at the beginning. Even when a woman is a few days late with her period, she can get a preliminary result in minutes. The man can be a part of this process: he can go to the pharmacy for the test kit, review the instructions and join in reading the results. The "joyful news" that women in earlier days imparted to their husbands in rituals of annunciation can now be communicated through a line appearing on a test strip. Although such an announcement is neither as dramatic nor as romantic as Lucy Ricardo believed it would be in 1952, it does make the father, along with the mother, the "first to know."

When the couple are having fertility problems, men play an even more central role. The couple are likely to resort first to low-tech measures for timing intercourse to coincide with ovulation—charting the woman's basal body temperature, using over-the-counter test kits to predict when ovulation occurs, and so on. The husband must coordinate his sexual activities to accommodate his wife's cycle.<sup>21</sup>

If low-tech measures fail, the husband's involvement increases. To determine the cause of infertility, the physician examines both the man and the

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20. See THE MERCK MANUAL OF MEDICAL INFORMATION, HOME EDITION 1127-28 (1997) [hereinafter MERCK MANUAL]. Traditional tubal ligation requires an abdominal incision and a general or regional anesthetic. Laproscopic techniques, however, have reduced the trauma from the procedure, allowing many women to return home without an overnight hospital stay. In some cases, especially when other problems are present, a woman can be sterilized by surgical removal of the uterus (hysterectomy) or ovaries (oophorectomy).

21. See generally ARTHUR L. GREIL, NOT YET PREGNANT: INFERTILE COUPLES IN CONTEMPORARY AMERICA (1991); Liz Meerabeau, *Husbands' Participation in Fertility Treatment: They Also Serve Who Only Stand and Wait*, 11 SOC. OF HEALTH AND ILLNESS 396-410 (1991).

woman. The man is usually asked to masturbate into a sterile container so that his sperm can be counted and evaluated.<sup>22</sup> Although women traditionally bore the blame for infertility, it turns out that in approximately two-fifths of the cases, the problem lies in the man's production or delivery of sperm.<sup>23</sup> Being assigned responsibility for infertility may cause the man to feel anxious and inadequate, but is also likely to enhance paternal bonding if assisted reproduction is successful.

The couple participating in an assisted reproduction program may be required to have intercourse when the woman is ovulating and then dash to the physician's office so that a sample of the woman's cervical mucus can be taken.<sup>24</sup> The man becomes part of an engrossing medical drama in which he may feel a degree of empowerment because of its technical and scientific aspect. Even if the woman remains the defined patient, the man plays an important role.

If tests indicate a problem for either spouse, the physician may attempt in vitro fertilization, a process in which an egg is fertilized in a laboratory dish and then implanted in mother's uterus or fallopian tubes.<sup>25</sup> Sperm for in vitro fertilization is usually obtained by masturbation. If this does not work, the physician turns to more sophisticated techniques. In microsurgical epididymal sperm aspiration, the surgeon incises the epididymis (the coiled network of tubules that sits atop each testicle),<sup>26</sup> and aspirates the epididymal fluid with a micropipette.<sup>27</sup> In percutaneous epididymal sperm aspiration, the sperm is harvested from the epididymis by means of a micropipette inserted through the scrotum, eliminating the need for a surgical opening under general anesthesia.<sup>28</sup> In testicular sperm extraction, a piece of testicle is cut out, minced, and centrifuged.<sup>29</sup> Eggs for in vitro fertilization are obtained by inducing multiple ovulation through drug therapy and aspirating the ovarian follicles with a needle

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22. See BRIAN KEARNEY, *HIGH-TECH CONCEPTION: A COMPREHENSIVE HANDBOOK FOR CONSUMERS* 18 (1998). For an interesting discussion of how fertility clinics fail to provide men with a validating and reassuring venue for sperm contribution, see Yoram S. Carmeli & Daphna Birenbaum-Carmeli, *The Predicament of Masculinity: Towards Understanding the Male's Experience of Infertility Treatments*, 30 *SEX ROLES* 663, 671 (1994) (stating that men found the requirement that they masturbate at reproduction clinics to be stressful and embarrassing).

23. See KEARNEY, *supra* note 22, at 112.

24. See *id.* at 18. The test evaluates whether the man's sperm has the ability to swim through the mucus. See *id.*

25. In vitro fertilization began in 1978 with the birth of Louise Brown, the first "test-tube baby." Over a hundred thousand babies have been conceived around the world from this method, or one of its variants, in the years since. See *id.* at xvii.

26. See *id.* at 7.

27. See *id.* at 129.

28. See *id.* at 130. The downside of this procedure is that the surgeon must operate "blind" and may nick nearby tissues.

29. See *id.* A disadvantage of testicular sperm extraction is that the harvested sperm are immature and thus have lower motility. See *id.*

guided by an ultrasound wand.<sup>30</sup> The father may be allowed to accompany his partner during this procedure.<sup>31</sup> If either partner is unable to supply a viable gamete (sperm or egg), the couple may use a donor. They visit an egg or sperm bank and shop for the child's genes, considering factors such as race, ethnic background, physical type, and intelligence. Although this process may be stressful for the infertile partner who knows that he or she will not be the biological parent,<sup>32</sup> the couple's cooperation can bring both of them into the pregnancy before conception.<sup>33</sup>

Once sperm and egg are obtained, fertility specialists unite them. The sperm may simply be placed near the egg on the laboratory dish, but if this doesn't work, the physician may use micromanipulation techniques. In partial zona dissection, the technician opens the zona pellucida—the covering around the egg that protects against fertilization by more than one sperm—in order to allow the sperm better access; in subzonal insemination, a tiny needle is used to inject the sperm through the zona pellucida, but the sperm is not inserted into the egg; in intracytoplasmic sperm injection, the “ultimate development of micromanipulation,” a physician injects a single sperm cell into the center of an egg.<sup>34</sup> This process can achieve fertilization even if the father's sperm is deformed, underdeveloped or low in motility.<sup>35</sup> If the egg is successfully fertilized in vitro through any of these procedures, the physician implants the embryo into the mother's uterus or fallopian tubes. The male partner may be allowed to witness this procedure. Assisted reproduction has already gained a significant toehold in American medicine and seems almost certain to become more common during the coming years.<sup>36</sup>

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30. See *id.* at 74 (describing use of ovulation-stimulating drugs, such as follicle-stimulating hormone, gonadotropin-releasing hormone, human chorionic gonadotropin, or human menopausal gonadotropin).

31. See Carmeli & Birenbaum-Carmeli, *supra* note 22, at 669 (in Canada, although not in Israel, male partners were allowed to witness ovum retrieval procedures).

32. See *id.* at 674 (men are more threatened by the use of donated sperm than women are threatened by the use of donated eggs).

33. The in vitro procedure does not require either partner to be the biological parent. It is possible for physicians to fertilize another woman's egg in vitro with another man's sperm and then implant the embryo in the womb of the woman desiring to give birth; the embryos involved can be created years before the actual procedure and frozen for subsequent use. This has actually happened. See *Dateline NBC: Profile: Ready Made; New Jersey Couple Has Triplets Through Embryo Adoption* (NBC television broadcast, Sept. 14, 1998).

34. KEARNEY, *supra* note 22, at 112-13.

35. See *id.* at 117.

36. Couples may soon use high-tech procedures to select their children's sex. In September 1998, the Genetics and IVF Institute in Fairfax, Virginia, announced that it had developed a process of sorting sperm by the amount of DNA they contain. See Gina Kolata, *Researchers Report Success in Method to Pick Baby's Sex*, N.Y. TIMES, Sept. 9, 1998, at A1. The researchers reported an 85% success rate at selecting for girls and a 65% success rate for boys. While this technique cannot guarantee results, it stacks the deck in favor of the desired sex. If this process is introduced

If the woman is unable to carry a fetus to term, the couple may use a surrogate. The surrogate is artificially inseminated with the father's sperm and gives the baby over to the contracting couple for adoption.<sup>37</sup> Surrogacy can work well, but it is costly<sup>38</sup> and subject to legal risk.<sup>39</sup> In New York, for example, paid surrogacy contracts are illegal and may result in the court's refusing to approve an adoption unless the surrogate disclaims compensation.<sup>40</sup> These risks can be mitigated if the surrogacy contract is performed in a state with a more positive view of the process.<sup>41</sup> Parties can further reduce their legal risk by using "gestational" surrogacy, in which the surrogate is implanted with an embryo formed in vitro without any of her genetic endowment.<sup>42</sup> As compared with standard surrogacy, these arrangements are more likely to be legally enforceable,<sup>43</sup> and less likely to be repudiated by the surrogate,<sup>44</sup> but they are also more expensive because of the extra procedures involved.

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commercially, it will allow both men and women to plan their families in a way never before thought possible.

37. Surrogacy can also be utilized by male homosexual partners who wish to have a baby with one of them as the birth father. For an example, see Susan Swartz, *SR Woman Carrying Baby for Gay Couple*, SANTA ROSA (CA) PRESS DEMOCRAT, June 28, 1998, at B1.

38. The costs can include both payments of fees and expenses to the surrogate mother and payments to the agency that connects prospective parents with the surrogate. One recent surrogacy contract reportedly ran in the neighborhood of \$20,000. *See id.*

39. *See In re Baby M*, 537 A.2d 1227 (N.J. Sup. Ct. 1988) (upholding the right of surrogate mother to change her mind and keep the child, on ground that contracts for surrogacy were against the state's public policy).

40. *See In re Adoption of Paul*, 550 N.Y.S.2d 815 (N.Y. Fam. Ct., Kings County, 1990) (holding that surrogacy contract violated statutory prohibition on payment of money for adoption, and refusing to allow adoption by surrogate parents unless surrogate mother disclaimed right to promised payment).

41. *See Swartz, supra* note 37. California courts hold that surrogacy contracts cannot be enforced against the surrogate by the intended father, *see In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994), but do not view the contract for surrogacy as illegal in itself.

42. The fetus in gestational surrogacy cases can have any of four backgrounds: (a) father's sperm and mother's egg; (b) father's sperm and donated egg; (c) donated sperm and mother's egg; and (d) donated sperm and donated egg.

43. *See Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (upholding parental rights of biological mother and father against claims of gestational surrogate); *Moschetta*, 30 Cal. Rptr. 2d at 903 ("Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman's womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement."). Although legally more secure, gestational surrogacy is more expensive than standard surrogacy, requiring the technology of in vitro fertilization rather than the much simpler—and cheaper—method of artificial insemination.

44. *See* Stephen Smith, *Gestational Surrogates*, NPR MORNING EDITION, Apr. 10, 1998 (available at 1998 WL 3307000) (quoting a gestational surrogate "with this, I just feel like an incubator or a house for the baby to grow and so, it to me is completely different [than a standard surrogacy arrangement.]").

Men are often deeply involved in the surrogacy process. If a man is the genetic father, he may develop a bond with the future child that is even closer than the bond formed by his partner who is not a genetic parent. Regardless of which partner is the genetic parent, moreover, the father may participate in the negotiations and financial transactions incident to the surrogacy arrangement.

Another alternative for infertile couples is adoption. Here, too, the man's role vis-à-vis his partner is heightened as compared with ordinary pregnancy. If the couple adopts from an agency, they will be interviewed by caseworkers to assess their competence and potential as parents. The father as well as the mother must submit to these questions. If the parties adopt privately, the father may still have an important role in the negotiations with the birth mother or her representatives. The adoptive father and mother may be able to attend the birth and enjoy the benefits of early bonding that participation at a birth offers. Increasingly, in recent years, American parents are also adopting abroad.<sup>45</sup> The prospective parents travel to the country of the adoptive child's birth. They screen candidates for adoption in person or by videotape. The couple may have to live abroad. Both adoptive parents share responsibility for managing stress while these details are sorted out and ensuring that the process is not derailed by bureaucratic snafus.<sup>46</sup>

### C. Pregnancy

Pregnancy matters to men. Its significance in a man's life is vividly illustrated by customs of couvade, which are found in many tribal societies, and which have deep historical roots. The term "couvade" is derived from the French or Basque *couver*, meaning to "brew, hatch, or sit on eggs." The connotation is that men share in the experience of pregnancy and childbirth. The term denotes rituals in which the father participates in behaviors that are physiologically natural for the mother during and after childbirth;<sup>47</sup> these customs "require that the father of a child, at or before its birth and for some time after the event, should take to his bed . . . and behave generally as though he, and not his wife,

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45. In 1997, Americans adopted 13,000 children from abroad. See Corin Cummings, *Adopting from Russia: A War of Perceptions*, RUSSIAN LIFE, June/July 1998, at 10-17; Gordon Dickson, *Romanian Brothers Move to New Home; An Area Agency Helps a North Richland Hills Couple Adopt Two Young Boys*, FORT WORTH STAR-TELEGRAM, Aug. 2, 1998 (Arlington), at 3; Pat Underwood, *Men Go the Distance to Earn Daddy Status*, ARIZ. REPUBLIC, June 21, 1998 (East Valley Sunday Community), at EV1.

46. For a compelling story of a couple's experiences with international adoptions, see Dickson, *supra* note 45.

47. See A.L. KROEBER, ANTHROPOLOGY 543 (1923). A related custom is the performance by men of rituals in which pregnancy and childbirth are acted out—as in the case of the *pia manadi* dances performed by Carib Indian men, in which the actors assume female dress and act out a Caesarian section performed by a doctor on a pregnant woman. See Robert L. Munroe, *Male Transvestitism and the Couvade: A Psycho-Cultural Analysis*, 8 ETHOS 49, 56-57 (1980).

were undergoing the rigours of confinement."<sup>48</sup> Couvade rituals include practices ranging from the husband's participation in the mother's rest and recuperation, to fasting and dietary controls, to avoidance of work. Although couvade may appear beneficial to the husband, it is not an unmixed blessing: the man often must undergo starvation and endure other austerities.

Couvade customs begin early in a woman's pregnancy. Among the Car Nicobar, husbands do little or no work for a few months before the birth, abstaining from vigorous activities such as felling trees or digging post holes.<sup>49</sup> Among the Monumbo of Papua New Guinea, expectant husbands are shunned.<sup>50</sup> In other cultures, expectant husbands restrict their diet in order to ward off miscarriage and birth defects. They may be excluded from activities such as hunting, fishing, or warfare.<sup>51</sup>

Couvade typically peaks during labor and delivery. Sometimes, the husband engages in a full-fledged imitation of birth. The husband may pretend to be lying-in, "sometimes even simulating by groans and contortions the pains of labour, and . . . even dressing in his wife's clothes."<sup>52</sup> Among tribes of Southern India, for example, the husband, on being informed that his wife is going into labor, "immediately takes some of her clothes, puts on his forehead the mask which the women usually place on theirs, retires into a dark room, where there is only a very dim lamp, and lies down on the bed, covering himself up with a long cloth. When the child is born, it is washed and placed on the cot beside the father."<sup>53</sup> Ritual items of food are given to the father, not the mother; and, during the days of ceremonial uncleanness, "the man is treated as the other Hindus treat their women on such occasions. He is not allowed to leave his bed, but has everything needful brought to him."<sup>54</sup> Among the Korama of Mysore, the husband, when his wife's labor pains come on, takes to his bed for three days and takes medicine consisting of chicken and mutton broth spiced with ginger, pepper, onions, and garlic. While a midwife assists the wife, the husband "does nothing but eat, drink, and sleep." After the birth, the clothes of the husband, wife, and midwife are purified.<sup>55</sup>

Couvade rituals continue after the birth of the child. Among the Motu of New Guinea, the husband goes into isolation and fasts.<sup>56</sup> In Buka, near Bouganville Island, the husband retires to a hut and dozes before the fire for three days, only

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48. DAWSON, *supra* note 4, at 1.

49. See HUTTON WEBSTER, *TABOO: A SOCIOLOGICAL STUDY* 79 (1942).

50. See *id.* at 52.

51. See *id.* All sorts of other ritual behavior related to sympathetic magic are also associated with couvade. For example, husbands may avoid turning a lock, in the belief that if he does so the child's fingers will be twisted, or tying a knot, lest his wife experience difficulties in delivery. See *id.* at 49.

52. DAWSON, *supra* note 4.

53. WEBSTER, *supra* note 49, at 79.

54. *Id.* at 79-80.

55. *Id.* at 80.

56. See *id.* at 78.



returning to normal life over a period of weeks or months.<sup>57</sup> Among the Paraiyans of Travancore, the husband fasts for seven days, eating no cooked rice or other food, but only roots and fruit.<sup>58</sup> Among the tribes of Guiana, the father is considered to be as unclean as the mother after childbirth, and may have to purify himself by serving an older man for several months.<sup>59</sup> Similar restrictions on the father's postpartum activities are observed in many other cultures.<sup>60</sup>

One of the most extensive accounts of couvade is Margaret Mead's description of childbirth practices among the Arapesh. In this culture, the verb "to bear a child" is used for both parents, and the burdens of childbirth are considered to be as heavy for the man as for the woman.<sup>61</sup> After the infant is born and washed, the father lies down with the baby by his wife's side and is then said to be "in bed having a baby."<sup>62</sup> Father and mother fast for the first day.<sup>63</sup> If it is a first child, the father must be purified with the aid of an older male sponsor. The father goes into seclusion with his wife for five days, then accompanies his sponsor to a water-side hut, performs rituals of cleaning and drinking, and captures a large white ring, called an "eel," which the sponsor has put at the bottom of the pool. The eel, Mead observes, is symbolically connected to the phallus and thus the ceremony may "symbolize the regaining of the father's masculine nature after his important share in feminine functions."<sup>64</sup>

Explanations for couvade vary.<sup>65</sup> The most convincing is that the custom is a means by which a father proclaims his paternity, and thus assumes parental obligations.<sup>66</sup> In Malinowski's view,

[i]t is of high biological value for the human family to consist of both father and mother; if traditional customs and rules are there to establish a social situation of close moral proximity between father and child; if

57. *See id.*

58. *See id.* at 80.

59. *See id.* at 81.

60. *See id.* at 79-81 (Paduang Karen, Tangkhul, Car Nicobar, and Kuravar peoples).

61. MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* 32 (Morrow Paperback ed. 1963).

62. *Id.* at 33.

63. *See id.* at 34.

64. *Id.* at 35.

65. Munroe and Munroe propose that couvade allows men to express a feminine gender identity in socially approved ways. *See generally* Robert L. Munroe & Ruth H. Munroe, *Male Pregnancy Symptoms and Cross-Sex Identity in Three Societies*, 84 J. SOC. PSYCHOL. 11 (1971). Bruno Bettelheim, writing from a psychodynamic perspective, sees in the custom a man's attempt to find out what it is like to give birth and to maintain to himself that he can have a child. *See* BRUNO BETTELHEIM, *SYMBOLIC WOUNDS* 208 (1954). Another psychiatrist, Theodor Reik, views the custom as reflecting the father's ambivalent attitude of tender and hostile feelings towards his wife. *See* THEODOR REIK, *RITUAL: PSYCHO-ANALYTIC STUDIES, COUVADE AND THE PSYCHOGENESIS OF THE FEAR OF RETALIATION* 27-89 (1946).

66. *See* WEBSTER, *supra* note 49, at 81.

all such customs aim at drawing the man's attention to his offspring, then the *couvade* which makes man simulate the birth-pangs and the illness of maternity is of great value and provides the necessary stimulus and expression for paternal tendencies. The *couvade* and all the customs of its type serve to accentuate the principle of legitimacy, the child's need of a father.<sup>67</sup>

Along similar lines, Webster observes that

[f]ather and mother, having brought a child into the world, thus indicate their readiness to care for it, even though doing so requires them to observe many irksome and often painful restrictions. The inclusion of the child in the birth ceremonial binds it to the parents by ties of custom superimposed upon those of natural affection and also gives to it a recognized status in the community.<sup>68</sup>

Today industrial societies have no explicit *couvade* customs. But we do have the curious, little-understood, but widespread phenomenon of medical *couvade*—pregnancy symptoms in expectant fathers.<sup>69</sup> Onset is usually in the beginning of the second trimester, with a secondary increase late in the third.<sup>70</sup> Symptoms include bloating, cramps, toothache, irritability, nausea, indigestion, diarrhea, constipation, headache, moodiness, restlessness, and insomnia. Men may develop large appetites, as if "eating for two."<sup>71</sup> In unusual cases, *couvade* can cause extreme responses, including psychosis. *Couvade* is associated with a much higher frequency of doctor visits by expectant fathers seeking medical attention for pregnancy-related symptoms.<sup>72</sup>

*Couvade* symptoms have been found in many societies.<sup>73</sup> They occur even when the expectant father is apart from his wife during pregnancy,<sup>74</sup> and whether

67. BRONISLAW MALINOWSKI, *SEX AND REPRESSION IN SAVAGE SOCIETY* 215-16 (1927).

68. WEBSTER, *supra* note 49, at 81-82.

69. The syndrome was first named in W.H. Trehowan & M.F. Conlon, *The Couvade Syndrome*, III BRIT. J. PSYCH. 57-66 (1965).

70. See Hilary Klein, *Couvade Syndrome: Male Counterpart to Pregnancy*, 21 INT'L J. PSYCH. IN MED. 57, 58 (1991).

71. Kenneth E. Reid, *Fatherhood and Emotional Stress: The Couvade Syndrome*, 2 J. OF SOC. WELFARE 3, 7 (1975).

72. Lipkin and Lamb, in a study of the mates of 267 postpartum women, representing a sample of all births in a health maintenance organization of 36,000 members, found that the 60 men who sought treatment for *couvade* symptoms had a twofold increase in visits, had four times more symptoms than during control periods, and received twice as many prescriptions for medication as the men who were not affected. See Mack Lipkin, Jr. & Gerri S. Lamb, *The Couvade Syndrome: An Epidemiologic Study*, 96 ANNALS OF INTERNAL MED. 509, 510 (1982).

73. See, e.g., Chantima Khanobdee et al., *Couvade Syndrome in Expectant Thai Fathers*, 30 INT'L J. NURSING STUD. 125, 130 (1993) (syndrome appeared in 61% of the 172 expectant Thai fathers studied).

74. For example, soldiers on active duty during World War II reported symptoms around



or not the husband has taken prenatal classes or is otherwise prepared for childbirth.<sup>75</sup> Estimates of incidence range from a low of about eleven percent to a high of more than sixty percent.<sup>76</sup> When symptoms such as changes in sexual behavior, fear and curiosity are taken into account the incidence is even higher, with one study finding more than nine in ten expectant fathers displaying at least one couvade symptom.<sup>77</sup>

There is no generally accepted explanation for the syndrome. Candidates include somatized anxiety,<sup>78</sup> envy of the wife's ability to give birth,<sup>79</sup> identification with the patient's mother,<sup>80</sup> and ambivalent or empathic feelings for the wife.<sup>81</sup> Another explanation is that couvade symptoms symbolize the man's preparation for his role as a father.<sup>82</sup> Regardless of the explanation, it is clear that couvade syndrome represents something important about the role of men in procreation.

Even when they do not manifest physical symptoms of couvade, men are more involved in pregnancies than has often been supposed.<sup>83</sup> Men have powerful reactions upon learning of their partners' pregnancies.<sup>84</sup> Their feelings range from ambivalence to wonder, nurturance, and anticipation.<sup>85</sup> Expectant fathers feel greater anxiety, tension, and apprehensiveness than childless married

the time their wives were thought to be in labor, and experienced relief as soon as news of the delivery was received. See Kenneth E. Reid, *Fatherhood and Emotional Stress: The Couvade Syndrome*, 2 J. SOC. WELFARE 7 (1975).

75. See Bogren, *supra* note 5, at 63-64.

76. See S. Masoni et al., *The Couvade Syndrome*, 15 J. PSYCHOSOMATIC OBSTETRICS & GYNAECOLOGY 125-31 (1994).

77. See *id.* (91.78% of men in sample displayed symptoms of emotional involvement in their wives' pregnancies).

78. See Bogren, *supra* note 5, at 64.

79. See generally M. DAVID ENOCH ET AL., SOME UNCOMMON PSYCHIATRIC SYNDROMES (1967).

80. See W.N. Evans, *Simulated Pregnancy in Males*, 20 PSYCHOANALYTIC Q. 165 (1978).

81. See Reid, *supra* note 74, at 9-10.

82. For example, Longobucco and Freston found that expectant fathers experiencing symptoms scored higher on scales measuring paternal-role preparation than men not experiencing symptoms. See Diane Carol Longobucco & Margie S. Freston, *Relation of Somatic Symptoms to Degree of Paternal-Role Preparation of First-Time Expectant Fathers*, 18 J. OBSTETRIC GYNECOLOGIC AND NEONATAL NURSING 482-88 (1989). The relatively small sample size (65 men) makes this study difficult to evaluate, however.

83. See B. Chalmers & D. Meyer, *What Men Say About Pregnancy, Birth and Parenthood*, 17 J. PSYCHOSOMATIC OBSTETRICS & GYNAECOLOGY 47-52 (1996).

84. Chalmers and Meyer surveyed 115 first-time fathers in 1988 and 1989; 76.5% of the respondents said they were "thrilled" to hear of the pregnancy, and 73.9% said they were "excited." Other reported feelings included worries about finances (32.6%), fear (13%) and ambiguity (8.7%). *Id.* at 49.

85. See May & Perrin, *supra* note 6, at 74.

men.<sup>86</sup> Many of these feelings seem to be part of a bonding process with the fetus that begins even prior to delivery.<sup>87</sup> Men caress the fetus through their mates' bellies, sense its movements, and so on.<sup>88</sup> They report that they "feel" pregnant.<sup>89</sup> They want to know when the fetus moves and in what direction it is facing. They talk to the fetus and listen for its heartbeat.<sup>90</sup> As the pregnancy progresses they develop a mental image of their future child. They come to "anticipate" the baby, and, as part of that process, they prepare themselves physically and psychologically to become good caretakers.<sup>91</sup> They begin to act like and conceive of themselves as fathers.

One important factor for enhancing this bonding process is the ubiquity of prepared childbirth classes—a phenomenon now so widespread as to be a plausible Western analog to ritual couvade.<sup>92</sup> The Lamaze, Bradley, and other childbirth methods emphasize the importance of the father's (or other partner's) involvement.<sup>93</sup> Men not only have the opportunity to learn the details of pregnancy and delivery, but also join their partner during pregnancy, labor, and delivery. This process increases the attachment that expectant fathers may feel towards their future child.<sup>94</sup> Beyond prepared childbirth classes, men show other signs of involvement with their partners' pregnancies. For example, they increase their work around the house and otherwise help to prepare for the baby's arrival.<sup>95</sup> Popular culture is beginning to recognize the trend. Baby showers, formerly an exclusively female enclave, now sometimes include the father, who might be invited as part of a "couple's shower," or who might even receive a shower of his own.<sup>96</sup>

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86. See *id.* at 75.

87. See Mecca S. Cranley, *Roots of Attachment: The Relationship of Parents with Their Unborn*, 17 BIRTH DEFECTS: ORIGINAL ARTICLE SERIES 59, 62-63 (1981).

88. See R. Weaver & Mecca Cranley, *An Exploration of Paternal-Fetal Attachment Behavior*, 32 NURSING RES. 68 (1983).

89. Cranley, *supra* note 87, at 63.

90. See Mary J. Worth, *Becoming a Father of a Stillborn Child*, 6 CLINICAL NURSING RES. 71, 84 (1997).

91. Cranley, *supra* note 87, at 63.

92. See May & Perrin, *supra* note 6, at 70 (comparing prepared childbirth classes to couvade).

93. See, e.g., *The Bradley Method of Natural Childbirth*, <<http://www.bradleybirth.com/index.html>> (visited Mar. 7, 2000).

94. See generally J. Wapner, *The Attitudes, Feelings, and Behaviors of Expectant Fathers Attending Lamaze Classes*, 3 BIRTH FAM. 5 (1976).

95. See Cranley, *supra* note 87, at 70 (one-half of the expectant fathers surveyed did more work around the house during their wives' pregnancies and 88% helped prepare the house for the baby's arrival).

96. MARSIGLIO, *supra* note 15, at 7. Although men tend to be more involved, this does not mean that all aspects of the traditional stereotype are being discarded. A recent survey indicated that, just as in the cultural narrative of the 1950s, men today are much more likely to wish for a boy as for a girl, although approximately half the respondents indicated that they would be happy either

Male participation in pregnancy is enhanced by technologies of prenatal testing and monitoring. The most common is ultrasound, which can be used independently or as an adjunct to other prenatal tests.<sup>97</sup> Ultrasound rules out medical conditions (heart malformations, spina bifida, etc.), but it offers an additional benefit: it facilitates bonding between parents and fetus<sup>98</sup> and stimulates the expectant couple to adjust their self-identities to include the role of parents.<sup>99</sup> Sonograms show details that previously had been left to the imagination, including a beating heart, face, feet, hands, sexual organs—even the fetus sucking its thumb. They are a “window on the womb” through which the expectant parents can observe the fetus in motion.<sup>100</sup> Usually, the technicians let the parents videotape the sonogram for later viewing. If the parents return for repeated procedures, they can observe how the fetus evolves. Ultrasound also discloses the sex of their fetus. Knowing the sex allows the parents to name the fetus and to imagine it as a real part of their lives. All this facilitates bonding.<sup>101</sup>

In amniocentesis, physicians obtain fetal cells by inserting a needle into the amniotic sac.<sup>102</sup> Usually performed between fifteen and seventeen weeks of pregnancy, amniocentesis can determine the sex of the baby; it also tests for spina bifida, anencephaly, and other abnormalities.<sup>103</sup> Another procedure, chorionic villus sampling, is usually performed earlier in the pregnancy than amniocentesis. The physician removes a sample of tissue from a part of the placenta—the chorionic villi—that contains fetal cells.<sup>104</sup> The results, in the form of a chromosomal map, provide the parents with their first “picture” of the fetus. Although the chromosomes do not show the fetus itself, they carry another meaning: they symbolize the fact that the fetus carries their genetic endowment. This imagery may be particularly potent for fathers, who can observe their own paternity in the squiggly images the procedure generates.

Enhanced knowledge of medical risks also can involve the expectant father. For example, the mother-to-be may decide to quit smoking in order to protect the

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way. See Chalmers & Meyer, *supra* note 83, at 49-50 (expectant fathers are about twice as likely to wish for a boy as for a girl).

97. See MERCK MANUAL, *supra* note 20, at 1132, 1135. On the impact of ultrasound on a man's relationship with his children, see, for example, MARSIGLIO, *supra* note 15, at 6.

98. See Worth, *supra* note 90, at 72 (“With the use of technology, particularly early ultrasounds, attachment [between parent and child] can begin even earlier than was once thought.”).

99. See *id.* at 7 (citing research findings that visual perception is an important stimulus for assuming paternal role).

100. RICHARD W. WERTZ & DOROTHY C. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 246 (expanded ed., 1989).

101. See Worth, *supra* note 90, at 71.

102. See KEARNEY, *supra* note 22, at 305-06.

103. See MERCK MANUAL, *supra* note 20, at 1134.

104. The fetal tissue can then be diagnosed for genetic abnormalities. The advantage of CVS over amniocentesis is that it can be performed much earlier in the pregnancy (at about nine weeks) and thus the abortion decision can be made earlier and with less trauma. See KEARNEY, *supra* note 22, at 306.

fetus against risks of decreased birth weight, pre-term labor, and birth defects. Her partner may quit smoking himself in order to offer moral support, to reduce his partner's temptation to smoke, or to limit the risk of secondhand smoke. Similarly, the expectant father may become involved in his partner's efforts to abstain from alcohol or other drugs.<sup>105</sup> If alcohol or drug use is an important part of the couple's life style, cessation of these activities can have an impact both on the relationship of the parties and on the father's experience with the fetus. While the father may find that foregoing desired habits in consideration for fetal welfare is frustrating, the impact on the father's habits and lifestyle calls attention to the needs of the fetus, and thus facilitates the creation of an emotional bond.

If the pregnancy results in medical complications, the expectant father's role may increase further. Fetal-assessment studies, such as non-stress tests or oxytocin challenge tests, appear to accelerate parental attachment.<sup>106</sup> If the mother is at high risk of pre-term labor, she may need to alter her behavior, and may have to stay in bed during the final stages of pregnancy. The mother's immobilization is likely to place increased care-taking demands on the father. In some cases, the mother may be supplied with home uterine monitoring devices that track signs of pre-term labor. Because home monitoring provides a constant reminder to both parents of the fetus and its needs, these devices are likely to spark enhanced feelings of bondedness in both parents.

#### D. Abortion

Men play a significant, although under-appreciated, role in abortion.<sup>107</sup> Most women tell their partners about their decision to abort.<sup>108</sup> Men, in turn, often want to offer assistance,<sup>109</sup> and usually play a role if they have an ongoing

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105. In addition to providing moral support for the mother's smoking and drinking cessation efforts, the father may be able to improve the child's health directly by reducing his intake of these substances. See Theodore J. Cicero, *Effects of Paternal Exposure to Alcohol on Offspring Development*, 18 ALCOHOL HEALTH AND RESEARCH WORLD 37-40 (1994) (suggesting that paternal exposure to alcohol can harm fetus).

106. See Cranley, *supra* note 87, at 80.

107. Men played a similar role even before the advent of modern abortion. Among the Arapesh peoples, for example, the midwife tells the father the child's sex, whereupon the father answers "wash it" or "do not wash it." If the latter command is given, the baby is left to die. See MEAD, *supra* note 61, at 32-33.

108. See Barbara Ryan & Eric Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. MARRIAGE & THE FAM. 41-50, 44 (1989) (82.5% of women surveyed told their partner of their decision to abort).

109. Shostak and McLouth's survey of 1000 men at abortion waiting rooms found that 58% of the respondents believed that an unmarried man should have as much say in the matter as his lover, and 80% believed that a husband should have as much say as his wife. See ARTHUR B. SHOSTAK & GARY McLOUTH, *MEN AND ABORTION: LESSONS, LOSSES, AND LOVE* 34 (1984). Most men, however, agreed with the proposition that a woman "owns" her body and should have ultimate

relationship with the woman.<sup>110</sup> Men often accompany their partner to the abortion clinic,<sup>111</sup> and frequently pay some of the bill.<sup>112</sup> Most would like to be present during the procedure, although they usually are excluded.<sup>113</sup> They keep vigil in waiting rooms<sup>114</sup> while their partner is being treated.<sup>115</sup>

Men experience a wide range of emotions concerning abortion, including fear, guilt, anxiety, self-doubt, and self-pity.<sup>116</sup> Many have feelings and thoughts about the fetus: curiosity, troublesome feelings, and sadness.<sup>117</sup> They tend to experience the day of the abortion as emotionally moving, but positive.<sup>118</sup> However, the longer-range consequences can be more difficult, either because intimate relationships suffer, or because the man feels guilt or remorse.<sup>119</sup> Some men acutely feel the loss of the fetus and of their role as father, and find their

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authority over how she uses it. *Id.*

110. See Akin Adebayo, *Male Attitudes Toward Abortion: An Analysis of Urban Survey Data*, 22 SOC. INDICATORS RES. 213-28 (1990); Ryan & Plutzer, *supra* note 108.

111. See SHOSTAK & MCLOUTH, *supra* note 109, at 299-304. While estimates vary, it is probable that males accompany women to the abortion clinic about 50% of the time. *See id.* at 17 n.1. The authors estimated that as of 1984, about 600,000 men accompanied women to abortion clinics. *See id.* at 2. A later study by Ryan and Plutzer found that about two-thirds of husbands accompanied their wives to the clinic. *See* Ryan & Plutzer, *supra* note 108, at 45.

112. Shostak and McLouth's survey found that 57% of the men they interviewed in abortion clinic waiting rooms paid the entire bill, 29% paid half, and another 6% paid for some; only 8% paid nothing. *See* SHOSTAK & MCLOUTH, *supra* note 109, at 36.

113. Most men would prefer to assist their partners in these locations: 69% of men surveyed by Shostak and McLouth wanted to accompany their partners in the procedure room and 91% wanted to join them in the recovery room. *See id.* at 61.

114. *See id.* at 52. Only 12% of the abortion clinics surveyed by Shostak and McLouth allowed men to accompany their partners in the abortion procedure or recovery rooms. *See id.* at 60. Many men find their exclusion to be stressful or irksome. *See id.* at 55-56.

115. Like expectant fathers of a previous generation, men waiting at abortion clinics stare into space, gulp coffee, snooze, fiddle with shoelaces, talk, read, and so on. They "leaf through tattered copies of old magazines, leaving the stories unread. For the most part, they avoid eye contact with one another, and when the fight to concentrate on the magazines is lost, their eyes remain fixed on the floor." *Id.* at 52. The difference is that, instead of expecting a baby to appear through the glass viewing screen, the men anticipate only that they will be able to accompany their partners away from the clinic with the procedure having been completed successfully.

Interestingly, men seem to behave in a similar fashion in reproductive clinics. Carmeli and Birenbaum-Carmeli observed that in contrast with female patients who shared information and supported one another, male patients at such clinics avoided one another, never approached other patients, spent most of their time behind newspapers, and showed embarrassment when called by their names. *See* Carmeli & Birenbaum-Carmeli, *supra* note 22, at 673.

116. *See* SHOSTAK & MCLOUTH, *supra* note 109, at 41.

117. *See id.* at 40.

118. *See id.* at 63.

119. *See id.* at 105.

thoughts returning to those topics long afterwards.<sup>120</sup> Often, they hide stress by controlling or denying feelings, either because the feelings are too painful, or because they feel a need to support their partners.<sup>121</sup> Men may be particularly stressed because of the lack of anyone to talk to about their feelings. Even if the couple has not explicitly decided to maintain confidentiality, the man may feel embarrassed or ashamed, or may simply lack the ability to share feelings.<sup>122</sup> For many men, their partner is their only confidante.<sup>123</sup>

### *E. Perinatal Loss*

Perinatal loss—miscarriage, stillbirth, neonatal death, and sudden infant death syndrome—has a profound effect on both men and women.<sup>124</sup> Such events, which remain common even in an era of widespread perinatal and neonatal health care delivery,<sup>125</sup> provide powerful evidence of the depth and importance of parental bonding with the fetus and newborn. The extent of parental grief over perinatal loss was long underestimated, perhaps because, in an era of high infant mortality, infant death was such a common event. Even as late as the 1940s, prominent psychologists believed that because attachment to the child occurred only at birth, perinatal loss could not cause grief.<sup>126</sup> Fathers especially were ignored.<sup>127</sup> The traditional view was that men should get on with life and support their wives.<sup>128</sup> In fact, however, men feel confusion, depression, sadness, and anxiety.<sup>129</sup> Many report intimate feelings towards the fetus before birth.<sup>130</sup> When

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120. See *id.* at 108-09 (finding, *inter alia*, that 69% of men surveyed long after the abortion had thoughts about the fetus, and 9% had such thoughts frequently).

121. See *id.* at 37.

122. On men's difficulty in expressing their feelings, see, e.g., REUBEN FINE, *TROUBLED MEN: THE PSYCHOLOGY, EMOTIONAL CONFLICTS, AND THERAPY OF MEN* 262-82 (1988); TERRENCE REAL, *I DON'T WANT TO TALK ABOUT IT: OVERCOMING THE SECRET LEGACY OF MALE DEPRESSION* 55 (1997).

123. Shostak and McLouth find that three out of four men had spoken with no one but their partners. See SHOSTAK & MCLOUTH, *supra* note 109, at 26.

124. For general introduction, see KLAUS & KENNEL, *supra* note 7, at 162-96.

125. See Cynthia Bach Hughes & Judith Page-Lieberman, *Fathers Experiencing a Perinatal Loss*, 13 *DEATH STUD.* 537, 538 (1989).

126. See Helene Deutch, *Bereavement Following a Stillborn Child*, 222 *PRACTITIONER* 115-18 (1945) (grief over perinatal death represents painful of non-fulfillment of fantasized wish, rather than genuine mourning).

127. See Worth, *supra* note 90, at 72.

128. See generally John E. Puddifoot & Martin P. Johnson, *The Legitimacy of Grieving: The Partner's Experience at Miscarriage*, 45 *SOC. SCI. MED.* 837 (1997).

129. See, e.g., Rosanne Harrigan et al., *Perinatal Grief: Response to the Loss of an Infant*, 12 *NEONATAL NETWORK* 25 (1993); Hughes & Page-Lieberman, *supra* note 125; Puddifoot & Johnson, *supra* note 128; Worth, *supra* note 90.

130. See Hughes & Page-Lieberman, *supra* note 125, at 544 (43% of fathers surveyed experienced shock at perinatal death, and 45% reported feeling close to the fetus before birth).



the fetus dies, they go through the stages of the grief process—shock and disbelief, denial, anger, bargaining, depression, and finally, acceptance.<sup>131</sup> For many such men, the grief is associated with the loss of the father's role for which they had been preparing.<sup>132</sup> They feel the absence of a baby to hold, cuddle, and carry.

The father's sense of loss is likely to be particularly acute following stillbirth. Most fathers of stillborn children attend the birth, a quarter hold their baby's body, and one fifth return for follow-up appointments.<sup>133</sup> Men often need to affirm their paternal role in the face of stillbirth. One dressed the child for the funeral in the same outfit his other two children wore home from the hospital, wrapped the child in a special blanket, and read the family's favorite bedtime story to the child on the way to the funeral.<sup>134</sup>

While fathers experience grief over perinatal loss, they may recover more quickly and experience the loss less acutely than their wives.<sup>135</sup> However, it is possible that the reports of less intense male grief are an artifact of the questions asked, which may not pick up on the different ways men and women express mourning.<sup>136</sup> Men act out their grief. They seek comfort in a "masculine" role characterized by the need to be strong, to deny pain, and to avoid the topic in conversation.<sup>137</sup> They often take on the father function for which they had been preparing as if the child had lived:<sup>138</sup> they may lose themselves in their "good provider" roles,<sup>139</sup> or may deny their own pain in order to help their partners

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131. See *id.* at 549-51. For a classic account of the grieving process, see ELIZABETH KUBLER-ROSS, *ON DEATH AND DYING* (1969).

132. See Worth, *supra* note 90.

133. See Rita J. Revak-Lutz & Kenneth R. Kellner, *Paternal Involvement After Perinatal Death*, 14 J. PERINATOLOGY 442-45 (1994) (sample of 722 cases of perinatal death, mostly among parents of lower socioeconomic status). These authors recommend that fathers be included in grief counseling when perinatal death occurs. See *id.* at 442.

134. See *id.* at 81.

135. See J.C. Vance et al., *Psychological Changes in Parents Eight Months After the Loss of an Infant from Stillbirth, Neonatal Death, or Sudden Infant Death Syndrome—A Longitudinal Study*, 96 PEDIATRICS 933, 936 (1995) (finding that both mothers and fathers experienced a lifting of anxiety and depression eight months after the loss, and that fathers' symptoms decreased more than mothers).

136. See *id.* at 936-37 (observing that while fathers may have recovered more rapidly from depression and anxiety, this did not necessarily mean that fathers grieve less; the study did not consider other possible grief reactions such as changes in alcohol consumption or work behavior).

137. Atle Dyregrov, *Parental Reactions to the Loss of an Infant Child: A Review*, 31 SCANDINAVIAN J. PSYCHOL. 266, 269 (1990) (surveying literature and noting findings that fathers tend not to want to talk about loss).

138. See generally Worth, *supra* note 90.

139. Manfred Beutel et al., *Similarities and Differences in Couples' Grief Reactions Following a Miscarriage: Results from a Longitudinal Study*, 40 J. PSYCHOSOMATIC RES. 245, 249 (1996) (men sought distraction by immersion in work); Dyregrov, *supra* note 137, at 269 (predominant coping mechanism in fathers is to keep busy and directing their energies outwards).

cope.<sup>140</sup>

### *F. Labor and Delivery*

One of the most important recent changes in the medical approach to labor and delivery is the presence of fathers at birth.<sup>141</sup> Most hospitals welcome fathers, and many provide rooms where the couple can share the birth experience in a home-like setting.<sup>142</sup> Men who are present during labor and delivery generally enjoy the experience.<sup>143</sup> Their support has real benefits for the mother as well. Several studies suggest that women whose husbands stay with them suffer less pain and require less medication during childbirth and experience a lower rate of depression afterwards.<sup>144</sup>

Men can play an important role when medical interventions are indicated. For example, men and women today can share in the decision of when labor occurs, thanks to labor-inducing medications such as oxytocin.<sup>145</sup> Many hospitals also allow the father to be present during routine Caesarian sections. This allows the father to participate, much as in a vaginal delivery, except that the mother's medication may actually make the father the more actively involved parent. If the operation requires complete anesthesia, the father will probably be excluded, but he is likely to observe the infant moments after birth. In such a case, the father may hold and rock the child while the mother recovers from the anesthetic.

### *G. Infant Care*

Once the baby is born, the father and mother must complete the psychological transition to parenthood. This can be as dramatic for the father as for the mother.<sup>146</sup> Many men bond with their children at first sight.<sup>147</sup> Greenberg

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140. See MERCK MANUAL, *supra* note 20, at 1172.

141. See *id.* at 1172. Husbands appear to have been more involved during the Nineteenth Century, see J. Jill Suitor, *Husbands' Participation in Childbirth: A Nineteenth-Century Phenomenon*, 1981 J. FAM. HIST. 278, 278, and were at least nearby during the first part of the Twentieth Century because many deliveries occurred at home. See Eileen Greif Fishbein, *The Couvade: A Review*, 10 J. OBSTETRIC, GYNECOLOGICAL & NEONATAL NURSING 356, 358 (1981). Husbands were excluded when doctors gained control of the process. See May & Perrin, *supra* note 6, at 76 (documenting physician resistance to father participation).

142. See MERCK MANUAL, *supra* note 20, at 1172.

143. See, e.g., Mary Reid Nichols, *Paternal Perspectives of the Childbirth Experience*, 21 MATERNAL CHILD NURSING J. 99 (1993).

144. See Dwenda K. Gjerdingen et al., *The Effects of Social Support on Women's Health During Pregnancy, Labor and Delivery, and the Postpartum Period*, 23 FAM. MED. 370, 373 (1991) (reviewing studies).

145. See MERCK MANUAL, *supra* note 20, at 1182. Although traditionally administered only in cases of obstetric or medical problems, labor induction is sometimes practiced in order to provide the parents with the ability to plan the birth of their baby in advance.

146. See Jacqueline F. Clinton, *Physical and Emotional Responses of Expectant Fathers Throughout Pregnancy and the Early Postpartum Period*, 24 INT'L J. OF NURSING STUD. 59, 67



and Morris term this experience "engrossment," a word that connotes the intense, almost hypnotic power that the newborn exercises over the father's attention.<sup>148</sup> Elements of engrossment include the father's joy in seeing the face of his newborn, his desire for and pleasure in tactile contact with the newborn, his awareness of the distinct characteristics of the newborn, and his perception that the newborn is perfect.<sup>149</sup> As one father reported, "I just sit and stare at it and talk to the wife and comfort her a bit. But the main thing is the baby. I just want to hold the baby . . . ."<sup>150</sup> Fathers often experience a "high" around their newborns; they feel "stunned, stoned, drunk, dazed, off-the-ground, full of energy, feeling ten feet tall, feeling different, abnormal, taken away, taken out of yourself."<sup>151</sup>

Many new fathers experience engrossment in the sense of immediate, intense love. In Chalmers and Meyer's survey, 69.7% of new fathers reported feeling love at first sight, and 12.1% reported feelings of love after a few hours.<sup>152</sup> These paternal feelings continue through the first months of parenthood. Chalmers and Meyer found that the vast majority (84.2%) of fathers felt the first few months to be a "most wonderful experience."<sup>153</sup> These global feelings were matched by satisfying specific emotions—pride (92.9%), happiness (84.2%), excitement (84.2%), and a sense of being loved (59.7%).<sup>154</sup>

New fathers also feel stress. Like women, men experience the first few months of parenting as an emotional roller coaster. They suffer postpartum mood swings similar to those experienced by women,<sup>155</sup> and experience above-average levels of nervousness, difficulty concentrating, fatigue, headaches, and restlessness.<sup>156</sup> Furthermore, they may feel additional stress because they want to provide emotional support for their partner.<sup>157</sup>

(1987).

147. See MARSIGLIO, *supra* note 15, at 6 (discussing the importance of early holding); M. Rodholm, *Effects of Partner-Infant Postpartum Contact on Their Interaction 3 Months After Birth*, 5 EARLY HUMAN DEV. 79 (1981).

148. Martin Greenberg & Norman Morris, *Engrossment: The Newborn's Impact on the Father*, 44 AM. J. ORTHOPSYCHIATRY 520, 521 (1974).

149. See *id.* at 522-25.

150. *Id.* at 524.

151. *Id.*

152. See Chalmers & Meyer, *supra* note 83, at 50-51.

153. *Id.* at 51.

154. See *id.*

155. See David Quadagno et al., *Post-partum Moods in Men and Women*, 154 AM. J. OF OBSTETRICS AND GYNECOLOGY 1018, 1023 (1986) (men and women experience post-partum period in an emotionally similar way).

156. See Clinton, *supra* note 146, at 66.

157. When men provide emotional, tangible, or informational support during the post-partum period, their spouses tend to experience an enhanced sense of well-being. See Gjerdingen et al., *supra* note 144, at 371 (reviewing the literature). Occasionally the new father may even experience a mental breakdown. See generally Stanley Shapiro & Jack Nass, *Postpartum Psychosis in the*

Men can bond with their newborn children in numerous ways today that were not technologically or socially feasible in years past. A simple means for enhancing paternal connection is to educate fathers about the child's basic abilities and reflexes.<sup>158</sup> Such information seems to facilitate bonding because the father becomes more aware of, and attuned to, his child's experience of life. Men can also bond through feeding. They bottle-feed their babies,<sup>159</sup> using either formula or breast milk, and, in the process, share an intimacy that was once available only to mothers.<sup>160</sup> When the mother breast-feeds, the father can still play a role: his feedback influences his partner's decision about breast feeding,<sup>161</sup> and he can bring the baby to the mother or return it to the crib.<sup>162</sup> Men are also increasingly taking time to be with their babies,<sup>163</sup> and thus learn the joys

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*Male*, 19 PSYCHOPATHOLOGY 138 (1986).

158. See generally Barbara J. Myers, *Early Intervention Using Brazelton Training with Middle-Class Mothers and Fathers of Newborns*, 53 CHILD DEV. 462 (1982) (reporting that fathers who were taught to perform a Brazelton exam on their newborns were both more knowledgeable about their newborns and were more involved in caretaking after four weeks than control fathers).

159. See Chalmers & Meyer, *supra* note 83, at 51 (70.8% of the fathers of newborns surveyed whose babies were being bottle-fed did so at least once or more every day).

160. The single most cogent image in society of parent-child bonding is that of the baby "at the breast." D.W. WINNICOTT, *THE CHILD, THE FAMILY, AND THE OUTSIDE WORLD* 30 (1964) ("[I]nfant feeding is a matter of infant-mother relationship, a putting into practice of a love-relationship between two human beings."); MARILYN YABLON, *A HISTORY OF THE BREAST* 5 (1997) (citing the example of the baby Jesus suckling at his mother's breast as a "metaphor for the spiritual nurturance of all Christian souls"). Freud described the connection between the mother and the suckling baby as the "prototype of every relation of love." SIGMUND FREUD, *THREE ESSAYS ON THE THEORY OF SEXUALITY* 48 (1962). Men, being unable to breast feed, were deprived by nature from the closeness that the mother feels for her baby when it suckles. That situation changed, however, with the discovery of pasteurization and sterilization, which made it safe to feed babies from a bottle. Men could feed babies from a bottle just as easily as women. On the growth of bottle-feeding during the Nineteenth Century, see YABLON, *supra*, at 126.

161. For example, in a study of 556 Australian mothers, Scott, Binns, and Aroni found that the most important factor influencing a woman's decision to breast feed was the father's reported preference. See J.A. Scott et al., *The Influence of Reported Paternal Attitudes on the Decision to Breast-Feed*, 33 J. PEDIATRICS & CHILD HEALTH 305, 306 (1997) (women who perceived and stated that their partners had a definite preference for breast-feeding were ten times more likely to initiate breast-feeding than those whose partners either preferred bottle-feeding or were ambivalent about the method of feeding).

162. On father assistance in breast feeding, see generally Naomi Bromberg Bar-Yam & Lori Darby, *Fathers and Breastfeeding: A Review of the Literature*, 13 J. HUM. LACTATION 45 (1997).

163. Federal law guarantees up to twelve weeks unpaid leave to any employee of a large company to attend to family business, including the birth of a baby. See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-2654 (1994). To date, men have not often taken advantage of this opportunity. For example, the *Washington Post* reported in 1993 that of Campbell's Soup employees who were offered a three-month unpaid parental leave, 95% of the eligible women took advantage of the perquisite, and no men did. See ELLIS COSE, *A MAN'S WORLD: HOW REAL IS*

and frustrations of feeding, diapering, bathing, burping, holding, rocking, and soothing an infant.<sup>164</sup> Men who care for their newborns seem to develop strong early bonds and experience the transition into the paternal role with greater ease.<sup>165</sup>

### III. PATERNAL BONDING AND THE LAW

So far, I have discussed social science research indicating that fathers have a capacity to bond emotionally with their offspring—a capacity that has flourished in recent years as a result of technological and social changes. What are the implications of this analysis for the law?

Paternal bonding becomes an issue for the law in three principal areas: abortion, adoption of infants born out of wedlock, and custody and visitation. Judges struggling with these cases have adopted a model of paternal bonding as a function of time. The general view is that prospective fathers have minimal bonding with the fetus during pregnancy—so little that their interests tend to be ignored or phrased in terms of an emotionally distanced, technical role. The courts tend to view paternal bonding as present, but weak during the first year or so after birth. Thereafter, the courts recognize that fathers can develop strong emotional bonds with their children, and look to certain stylized behaviors as evidence of bonding—time spent with the children, involvement in caretaking, acknowledgement of the paternal role, and fulfillment of the obligations incident to fatherhood. This model of paternal bonding can be found in decisions across a range of doctrinal categories. Despite its ubiquity, the model is only partially consistent with the literature cited above. The courts recognize male capacities to develop paternal bonds. However, they tend to underestimate the importance of such bonding during pregnancy and early childhood. Moreover, in looking only to certain stylized indicia of bonding, the courts may overlook other relevant evidence. These issues are addressed in the present section.

#### A. Abortion

We have seen that men have a promise to bond with their potential children even before birth and to prepare themselves in important ways for their roles as fathers. We have also seen that many men participate with the prospective mother in important decisions about the pregnancy, and that they often provide logistical, emotional, and financial support for an abortion. On the other hand, the pregnant woman enjoys a right of privacy to control her own body and to make fundamental decisions about her pregnancy, including the decision to abort.<sup>166</sup> This tension between the interests of the father and the mother raises

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MALE PRIVILEGE—AND HOW HIGH IS ITS PRICE? 119 (1995).

164. See generally MARTIN O'CONNELL, WHERE'S PAPA: FATHERS' ROLE IN CHILD CARE (1993).

165. See Ann M. Taubenheim, *Paternal-Infant Bonding in the First-Time Father*, 10 J. OF OBSTETRIC, GYNECOLOGICAL AND NEONATAL NURSING 261, 263 (1981).

166. See *Roe v. Wade*, 410 U.S. 113 (1973).

important and difficult issues of legal and social policy.

The Supreme Court first addressed these issues in *Planned Parenthood v. Danforth*.<sup>167</sup> At issue was a statute requiring the husband's consent to an abortion during the first trimester, unless a doctor certified that the abortion was necessary to save the woman's life. Writing for the Court, Justice Blackmun concluded that the spousal veto infringed upon the woman's right of privacy under *Roe v. Wade*.<sup>168</sup>

Although the holding in *Danforth* was quite reasonable, given *Roe*, the analysis offered to support that holding was problematic. As regards the interests of the father, Justice Blackmun said the following: "[We] are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."<sup>169</sup> Although this language appears to represent a nod in the direction of fathers' rights, its practical effect is otherwise. For starters, the Court's use of the double negative ("we are not unaware") expressed a supercilious attitude towards the father's interests; double negatives in judicial opinions almost always entail the positive but imply the negative.<sup>170</sup> When the rest of the language is parsed, it becomes evident that the forbidding tone of the introductory clause was not accidental. The paternal concern recognized by the Court existed only within the framework of the woman's interests: the husband is properly interested in "his wife's pregnancy." The implication is that the husband's concerns are derivative of the wife's.

Consider also the terms Justice Blackmun enlisted to flesh out the image: the husband is credited with being "devoted" and "protective." Each of these adjectives is directed toward the wife. They do not define the husband as an autonomous actor, but rather fix him in orbit around his wife by the gravitation of implied prepositions—the husband is devoted *to* his wife and interested *in* her pregnancy.<sup>171</sup> The implication is that if a husband is truly "devoted" to his wife, he will recognize that his own interests should give way in the event of a conflict. Similarly, if the husband is "protective," he will provide safety for his wife, including giving her the emotional security she needs to nurture her own body. Again, the implication is that the husband should defer.

To the extent the fetus is the object of the potential father's concern, the Court conceived of it only as an object *within* the woman's body: a devoted and protective husband is interested and concerned in the "growth and development of the fetus *she is carrying*."<sup>172</sup> Grammar recapitulates ontogeny here: "fetus"

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167. 428 U.S. 52 (1976).

168. See *Roe*, 410 U.S. at 113.

169. *Danforth*, 428 U.S. at 69.

170. Consider how the tone of the opinion would have changed if the Court had said "we are aware" instead of "we are not unaware."

171. Obviously, the devotion and protectiveness involved are directed towards the wife rather than the fetus (an expectant father who was "protective" of the fetus might be inclined to contest his wife's wish to abort).

172. *Id.* (emphasis added).

is embedded within a womb of words dedicated to "wife." The implication is that the father's concern is not for the fetus *per se*, but only for the fetus as an extension of his wife.

There is a further qualification, moreover, implicit in the Court's reference to "growth and development." The father's concern, as recognized by the Court, is not actually for the fetus as a being, an object to which the father can bond, but rather for the *processes* that occur to the fetus. The father is interested in the fetus in the same way, for example, as he might be involved in monitoring the progress of a house that a contractor is building for his family. In phrasing the man's interest in a technical and distancing way, Justice Blackmun discounted the capacity for paternal bonding.

Perhaps the most telling aspect of the Court's formulation is that it never acknowledged that the father can have a direct bond with the fetus, or that pregnancy can alter a man's self-concept as he grows into the role of "father." The Court could easily have admitted these propositions without slipping into the problematic territory of recognizing the fetus as a "human being." Designating a fetus as a human being is not a threshold requirement for the potential father to emotionally bond with it, or for the pregnancy to induce a change in the potential father's self-concept. Whatever its existential status, the fetus may be the object of paternal attachment.

The man's job, within the framework of the *Danforth* opinion, was to be a provider, a problem solver, and a supplier of emotional support for his wife. He looked after his wife's pregnancy from a distance, respectfully, and with due acknowledgement that the matter falls within the wife's domestic sphere. If a problem arose in the pregnancy, he was prepared to intervene, applying his male capacities for logic and reason to counterbalance his wife's capacity for emotionality. His job was to support his wife by being devoted and protective. The opinion in *Danforth*, in short, was premised on a stereotype of the Good Husband of the 1950s and 1960s.<sup>173</sup>

The low opinion that the *Danforth* Court seemed to harbor towards the possibility of paternal bonding during pregnancy is illustrated by the analysis the Court employed to reject a husband's veto of the wife's abortion decision. The Court could have structured the analysis as a *balancing* between the woman's privacy interest in controlling her body, the state's interest in protecting potential life, and the potential father's interest in his paternity and emotional connection with the fetus. In this balancing of interests, it might well have been proper for

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173. This Good Husband role has roots in the Victorian period. As one leading authority commented in 1904,

Man has a far less exquisite tenderness for his off-spring than woman. There is little else than moral sympathy which attaches the father to the infant. Paternal love *does not exist* save as a thing of growth, of education. The sense of proprietorship, a sort of manly pride is about the extent of a father's feeling toward his infant during the first days or weeks of its life. Not so with the mother; she loves her child as the fruit of her womb, as the purest of her blood, as her own life . . .

WILLIAM H. WALLING, *SEXOLOGY* 128 (1904).

the Court to conclude, as it did, that the woman should have the final call. But the Court did not engage in such a balancing test. Instead of weighing the potential father's interest, the Court simply ignored it.

Justice Blackmun invalidated the paternal consent requirement, not because the pregnant woman's interests were more compelling than the potential father's, but because the state could not "delegate" to the father the power to prevent an abortion when it lacked power to bar abortion directly.<sup>174</sup> This analysis seems out of place. The paternal consent requirement at issue in *Danforth* was not a delegation of power to the potential father, any more than a statute guaranteeing a woman's right to abortion would "delegate" power to the potential mother. Instead, the statute recognized the father's independent right to protect his own interests in an important area of social policy. The father who used the statutory power to refuse consent would not act as an agent of the state, but rather as a champion of his own interests. By characterizing the issue as one of delegation, the opinion in *Danforth* denied the father's juridical rights in the law of abortion.

A harder case was presented in *Planned Parenthood v. Casey*.<sup>175</sup> In *Casey*, the state did not require spousal consent, but only notification: except in cases of medical emergency, a married woman had to provide her physician with a signed statement that she had notified her spouse of the abortion.<sup>176</sup> The woman had the option of providing an alternative statement certifying that her husband was not the father, that her husband could not be located, that the pregnancy was the result of a reported spousal sexual assault, or that she believed that notifying her husband would cause him or someone else to inflict bodily injury on her.<sup>177</sup>

The issue in *Casey* was not whether the woman's interest in her pregnancy outweighed the man's interest. That question had been resolved in *Danforth*. The issue was rather whether, given *Danforth*, the woman's interest in keeping her husband uninformed about her intention to abort trumped the husband's interest in knowing. Writing jointly for the Court on this issue, Justices O'Connor, Kennedy and Souter struck down the spousal notification requirement as an impermissible infringement of a woman's right to privacy.<sup>178</sup> The Court offered three reasons for holding that a wife could not be compelled to inform her husband of her intent to abort.

First, the Court discounted the husband's interests by pointing to the realities of nature: "It is an *inescapable biological fact* that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's."<sup>179</sup> In other words, because the fetus is in the woman and not the man, the woman's interests trump.

This reasoning might be questioned on several fronts. First, it is not the case that biology is all within the women. As dozens of studies of couvade syndrome

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174. *Danforth*, 428 U.S. at 69.

175. 505 U.S. 833 (1992).

176. *See id.* at 844.

177. *See id.* at 887.

178. *See id.* at 898.

179. *Id.* at 895 (emphasis added).



indicate, expectant fathers experience biological symptoms of pregnancy along with their partners.<sup>180</sup> Both partners may feel nausea, irritability, food cravings, indigestion, and so on. Both can anticipate discomforts from pregnancy and the stresses of infant care. While the man's aches and pains are "psychosomatic" and are likely to be less intense than the woman's, they are not inconsequential.

In any event, the right to privacy recognized in *Roe v. Wade* is not based solely on biology, but also on issues of emotion and identity. Justices O'Connor, Kennedy and Souter stated as much in *Casey*, observing that the Fourteenth Amendment protects "the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*."<sup>181</sup> These choices include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>182</sup> This is not the language of biology, but of religion or philosophy.

The greater maternal involvement in biological pregnancy cannot by itself resolve these larger issues. What matters, in addition to the physical effects on the body, are the consequences of abortion for the individual's basic value structure and self-concept. Once the liberty interest protected by the Fourteenth Amendment is phrased in terms of choices and self-concept, rather than biology alone, the argument that the woman's interests should trump the man's requires further justification. Both men and women face choices about their roles as parents and their concepts of their own identities. Both men and women bond with the fetus. The fetus may be physically growing in the woman's belly, but in the geography of the psyche, it is inside the man as well. To exclude expectant fathers from juridical notice on grounds of biology is to miss the importance of pregnancy in a man's concept of himself as a parent and a procreative being and his vision of the meaning of his life.

A second reason offered by the *Casey* Court for favoring the wife's right to secrecy over the husband's right to know was the concern that a wife, or perhaps a child, would suffer abuse at the hands of the husband if she told. The Court reasoned that most women would tell their husbands about their intent to abort, even if not compelled to do so, and that when a woman did not want to tell her husband, her reticence was probably due to a reasonable fear that he would harm her.<sup>183</sup> Forcing the woman to inform her husband under such circumstances, in the Court's view, would place an undue burden on her right to abortion.<sup>184</sup>

It is instructive to compare the model of manhood in *Casey* with the image suggested in *Danforth*. *Danforth* painted the husband as devoted and protective, concerned for his wife's welfare, and anxious to act as a good provider and problem-solver in order to allow his wife to flourish within the female realm of home, hearth, and family.<sup>185</sup> These stereotypes appeared outmoded even in 1976,

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180. See *supra* Parts I-II.

181. *Casey*, 505 U.S. at 851 (emphasis added).

182. *Id.*

183. See *id.* at 887.

184. See *id.* at 892-96.

185. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976).

when *Danforth* was decided; they seem anachronistic today. The *Casey* Court, however, calls forth quite a different stereotype of manhood. Gone is the devoted and protective husband of *Danforth*. The husband depicted in *Casey* was a vicious wife-batterer, a man who commits "family violence" both "gruesome and torturous."<sup>186</sup> He is prone to "sexual abuse," "marital rape" and "sexual mutilation."<sup>187</sup> In his zeal to coerce his wife, he may abuse the children. If he finds out she is pregnant, he may assault her for being unfaithful.<sup>188</sup> If she flees to a shelter, he may track her down.<sup>189</sup> This apotheosis of violence is not just an imaginary construct. He is real—so real that one woman in eight is battered by her husband in a given year.<sup>190</sup> As many as one-third of all women will be physically assaulted by a partner or ex-partner during their lifetimes.<sup>191</sup> The battering husband is not some stranger, some intruder; he is a friend, a neighbor, a co-worker.

Without discounting the ubiquity and baneful effects of domestic abuse in American life and culture, one might still inquire into the Court's use of the specter of domestic abuse to strike down the spousal notification requirement in *Casey*. The Court readily acknowledged that most wives *do* tell their husbands, indicating that spousal abuse in the context of abortion notification is uncommon.<sup>192</sup> Even with respect to spouses who don't want to inform their husbands, the conclusion that they are likely to be battered if they tell was not well supported. The Court acknowledged that there was a "limited" amount of research on spousal notification, involving "samples too small to be representative."<sup>193</sup> In fact, the *only* study of spousal notification cited in the O'Connor-Kennedy-Souter opinion was Ryan and Plutzer's paper, *When Married Women Have Abortions*.<sup>194</sup> These authors surveyed 506 female clients of an abortion clinic about their husbands' responses to learning that their wives were pregnant or that they intended to obtain an abortion.<sup>195</sup> Although some of the husbands were angry (twelve percent) or upset (six percent), there was only one reported instance of verbal abuse and *none* of physical violence.<sup>196</sup> Under the circumstances, which might involve the husband's discovery of an extramarital affair, the response by the husbands appears to have been pacific, not abusive. The Court neglected to mention this detail.

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186. *Casey*, 505 U.S. at 888 (quoting district court findings of fact). Although the Justices cited the district court, they appeared to undertake a de novo review of the empirical evidence, citing in the process a number of sources not mentioned by the lower court.

187. *Id.* at 889 (quoting district court findings of fact).

188. *See id.*

189. *See id.*

190. *See id.* at 890.

191. *See id.* at 891.

192. *See id.* at 893.

193. *Id.* at 892.

194. *See id.* (citing Ryan & Plutzer, *supra* note 108, at 41).

195. *See* Ryan & Plutzer, *supra* note 108, at 41.

196. *See id.* at 41-50.



Lacking empirical support for the specific proposition that spousal notification would increase spousal assault, the Court fell back on statistics that wife-battering is a serious problem in American society and that battering husbands often psychologically abuse and control their wives.<sup>197</sup> This argument, however true, is hardly a reason for striking down the statute in *Casey*. The Court never adequately explained why the statute in question did not address the problem of anticipated abuse. The statute contained an exception for cases where the woman feared abuse: she could avoid obtaining spousal consent by signing a statement to the effect that she believed notifying her husband would cause him or someone else to harm her physically. The statute, in other words, addressed the problem of spousal violence and made accommodations for women who feared for their safety.<sup>198</sup>

While the Court recognized the reality of women's fears of male violence after notification, it failed to consider other, potentially countervailing concerns. Disclosure to the husband would not always have negative consequences for the wife, even in cases where the wife didn't want to tell. Honesty among spouses—even honesty over difficult issues such as abortion—might increase communication and enhance intimacy. Some husbands might surprise their wives by supporting the abortion and helping with the finances and logistics.<sup>199</sup> The couple might even decide to continue the pregnancy rather than cutting off a potential life.

Conversely, going ahead with an abortion without telling her husband might

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197. See *Casey*, 505 U.S. at 890-91.

198. The Court suggested that the exception was insufficient because a woman could be psychologically abused:

Many [women] may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends. These methods of psychological abuse may act as even more of a deterrent to notification than the possibility of physical violence, but women who are the victims of the abuse are not exempt from [the statute's] notification requirement.

*Id.* at 893. But in most cases, if the woman fears psychological abuse, she would have reason to fear physical abuse as well, and therefore could take advantage of the statutory exception. Moreover, the legislature may have had reason not to provide an exception from spousal notification in cases where the woman fears psychological abuse only. Unlike physical abuse, psychological abuse has no clear-cut definition and may be hard to distinguish from the fear that the husband will be angry—a concern that in itself would not seem to provide a sufficient reason for keeping the husband in the dark. The Court also suggested that husbands might take their rage out on the children. See *id.* However, the Court provided no evidence that husbands frequently engage in transfer abuse when informed of their wives' pregnancies. Moreover, because husbands who abuse their children also are likely to abuse their wives, the danger, if any, of transferred abuse would ordinarily be covered by the statutory exception for cases in which the wife herself fears abuse.

199. See generally SHOSTAK & MCLOUTH, *supra* note 109.

not always work to the wife's advantage. Wives might sometimes feel remorse about the abortion, which could potentially have been avoided if the wife had confided in her husband and, after discussion, decided to go through with the pregnancy. For their part, husbands who find out after the fact about the abortion are likely to feel much more betrayed and angry than they would feel if notified in advance.<sup>200</sup> The danger of abuse that might follow a belated revelation would seem to counteract some of the benefits to the wife of maintaining secrecy in the first place. Finally, even if the husband does not find out, it is not clear that allowing the wife to keep an abortion secret would save her from abuse. Most battered wives are battered repeatedly. Revelation of an intended abortion might be an excuse for battering, but, even in the absence of such an excuse, violent husbands might use another pretext for an assault. For too many women, the right not to inform their husbands about the abortion might not materially decrease their risk of being battered.

A final reason for striking down the spousal notification provision, in the view of Justices O'Connor, Kennedy and Souter, was that the requirement reflected an outmoded model of relationships between men and women, one "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."<sup>201</sup> The concept here was that women are autonomous people capable of making their own decisions. It is insulting to a woman's dignity and to her equal stature under the law to require her to report to her husband before she undertakes an action that the Constitution recognizes as within her sole and complete discretion. In sum, "a State may not give to a man the kind of dominion over his wife that parents exercise over their children."<sup>202</sup>

Few would dispute the force of the Court's observation that the status of women has changed since the days of the common law, and that these changes have been beneficial. However, the Court's analysis was a *non sequitur*. Upholding the spousal notification requirement would not have been equivalent to endorsing an outmoded common-law view of women's subordinate role. The statute at issue in *Casey* did not deny women full legal rights of equal citizenship. Indeed, the statute recognized that women enjoy *superior* rights to men in the matter of abortion. The issue in *Casey* was merely whether the husband had the right to know of the wife's intention to abort. Granting the husband such a right would hardly have revived outmoded common law conceptions of male supremacy.<sup>203</sup>

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200. It plausible that a husband would find out despite the wife's efforts to conceal an abortion. Even though abortion clinics maintain confidentiality, the husband might be able to trace the payment (for example, by examining the checkbook or credit card statement), or might hear about the abortion from a friend in whom his wife has confided. The wife herself might let the fact slip, or might admit the abortion in a moment of weakness, remorse, or emotional stress.

201. *Casey*, 505 U.S. at 898.

202. *Id.*

203. Although the *Casey* Court accused the state of entertaining outmoded stereotypes of a woman's role, the opinion itself suggested stereotypes of its own. The image of the pregnant

Neither *Danforth* nor *Casey* fully appreciated the male role in procreation. Instead, in rejecting the father's interest, the Court drew on stereotypes of masculinity: in *Danforth*, the traditional post-War image of the minimal father; in *Casey*, the Nineties image of the vicious wife-batterer. Like all stereotypes, these have elements of validity—some husbands are distant, others abusive. These images of masculinity, however, were incomplete. In valorizing certain pictures of manhood, the Court discounted others. In particular, it omitted the image of procreative man, the man whose emotional structure and personal identity are deeply involved in conception, pregnancy, and birth. The results in *Danforth* and *Casey* are not necessarily erroneous, given *Roe v. Wade*. But the cases were marred by the Court's failure to give the father's interests an appropriate weight (or even any real weight) in the abortion calculus.

### B. Adoption of Infants Born Out of Wedlock

Once a child is born, the relative interests of father and mother shift to some extent. The fault line here concerns the rights of unwed fathers to block adoption. In this area the courts have been somewhat more responsive to the interests of fathers than they have been in the case of abortion, but the full extent of the father's potential for bonding and growing into the paternal role is not developed. The key to the decisions appears to be the courts' perceptions of whether the father has, in fact, established a paternal bond.

The first important decision in this area, *Stanley v. Illinois*,<sup>204</sup> established that the state could not deny a father parental rights simply because he was not married to the child's mother, without a hearing as to the father's fitness or proof of neglect. In upholding the father's "cognizable and substantial" claim,<sup>205</sup> the Court observed that a man's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."<sup>206</sup> What is noteworthy about the opinion, for present purposes, is that the father had apparently established bonds with his children: he had lived with the mother for eighteen years, and during those years they had raised the children together.<sup>207</sup> The Court signaled its sensitivity to the father's relationship

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woman in *Casey* resembled, to some extent, the Fifties housewife of the *I Love Lucy* era. She wants something but does not want to tell her husband lest he be angry or forbidding. The difference in the narratives between the 1950s and the 1990s is that in *I Love Lucy*, the wife always ended up being caught in her deception; the message was that women were silly to compete with or subvert their husbands. In the Nineties, the deception is socially approved as a way of expressing her autonomy and right to self protection. This change in cultural script attributable to a revised image of the husband, from the benign patriarch of *Father Knows Best* to the raging abuser of *Thelma and Louise*. If the husband is kind, then the woman's reasons for deceiving him appear whimsical and headstrong; if he is violent and dangerous, then she has little choice but to deceive him.

204. 405 U.S. 645 (1972).

205. *Id.* at 652.

206. *Id.* at 651.

207. *See id.* at 646. There had apparently been a few gaps in the periods of cohabitation,

with his children by noting, in the introduction to the opinion, that when the mother died, the father "lost not only her but also his children."<sup>208</sup>

In contrast, the Court in *Quilloin v. Walcott*<sup>209</sup> upheld as applied a Georgia statute that gave unwed mothers, but not unwed fathers, the right to refuse consent to adoption. Again, the decision appeared to turn on the presence or absence of bonding between the child and its father. In *Quilloin*, the biological father had shown some degree of bonding. He consented to be named in the birth certificate, provided irregular financial support, and visited the child fairly frequently.<sup>210</sup> On the other hand, he never lived with the child, waited eleven years before petitioning for paternity, never sought or exercised any form of legal custody, and never "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>211</sup> Meanwhile, the mother had married another man and lived with him for nine years while raising the child as sole custodian.<sup>212</sup> During that period, the child had the opportunity to bond with the mother's husband as a father figure. The trial court concluded that the best interests of the child would not be served by granting the biological father's petition for legitimation, which would cut off the opportunity for the stepfather to adopt.<sup>213</sup> In these circumstances, the Supreme Court upheld the state statute, but only as applied to these facts, which indicated that the biological father's connection with his child was not all that it could have been, and that the child had developed a substitute paternal bond with the stepfather.

The Court reached a different result in *Caban v. Mohammed*.<sup>214</sup> A mother and stepfather petitioned to adopt a child born out of wedlock. The biological father objected, but was turned down by the New York courts on the basis of a law that allowed unwed mothers, but not unwed fathers, to block adoption of illegitimate children. The statute at issue was similar to the Georgia law that had been upheld, as applied, in *Quilloin*. However, in *Caban v. Mohammad*, the Supreme Court struck down the law. The principal difference between *Quilloin* and *Caban* appears to be that the biological father in *Caban* bonded emotionally with the child and accepted his paternal role, and no strong substitute paternal bond formed. The biological father was living with the mother at the time the child was born. He listed his name on the child's birth certificate.<sup>215</sup> After the couple separated, the father contributed to the child's financial support and continued to see him on a regular basis. He had, as the Court observed, "come forward to participate in the rearing of his child."<sup>216</sup> Meanwhile, the child was

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because the Court indicated that father and mother lived together "intermittently" for 18 years.

208. *Id.* at 645.

209. 434 U.S. 246 (1978).

210. *See id.* at 250.

211. *Id.* at 256.

212. *See id.* at 246.

213. *See id.* at 253.

214. 441 U.S. 380 (1979).

215. *See id.* at 382.

216. *Id.* at 392.

only two years old at the time of the adoption petition in *Caban*, and thus did not have the extended period of bonding with the stepfather as occurred in *Quilloin*. The evidence, in short, supported the existence of strong and unambiguous paternal bonding, and when such bonding was present, the Court recognized that the father had the same rights as the mother.

Paternal bonding resurfaced four years later in *Lehr v. Robertson*.<sup>217</sup> Lehr was the biological father of a child born out of wedlock. Prior to the child's birth, the mother left Lehr for another man, whom she subsequently married.<sup>218</sup> This couple raised the child for two years, during which time Lehr had little to do with the child, never offered to provide financial support, and never entered his name in a state "putative fathers registry" which would have entitled him to notice of adoption.<sup>219</sup> The husband and wife obtained an order of adoption without informing Lehr. When Lehr found out, he attempted to set aside the adoption.<sup>220</sup> The Supreme Court, however, declared the adoption valid, notwithstanding the fact that the state required fathers to undertake actions to preserve their claims of paternity (filing with the putative fathers registry) that were not required of mothers.<sup>221</sup> The key to the decision appears to have been the father's failure to bond with the child and his negligence in affirming his paternal role.

A number of important state court opinions have addressed questions left open by this line of Supreme Court cases. In *Friehe v. Schaad*,<sup>222</sup> the Nebraska Supreme Court upheld a statute that cut off the biological father's right to object to the placement of his out-of-wedlock child for adoption if he did not file a notice of intent to claim paternity within five days of the child's birth.<sup>223</sup> Because it is probable that most biological fathers would not know of this abbreviated time frame, the result of the statute was that some, like the father in *Friehe v. Schaad*, would lose their rights even though they wished to exercise them. In upholding the statute, the court emphasized that the father had not bonded with the baby, so that the only right he was deprived of was an "opportunity" to bond, which warrants a lower level of constitutional scrutiny.<sup>224</sup> The defect in the court's reasoning was its assumption that bonding could not take place before birth. If bonding occurred before birth, then the father was deprived, not of a mere "opportunity" to bond, but with an actual bonding relationship. Further, the father was arguably deprived of the distinct right to

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217. 463 U.S. 248 (1983).

218. See *id.* at 250.

219. *Id.* at 251.

220. See *id.* at 250.

221. See *id.* at 268.

222. 545 N.W.2d 740 (Neb. 1996).

223. See *id.* at 743.

224. The court distinguished a prior state case in which the statute had been declared unconstitutional as applied to a father who had bonded with his child for at least nineteen months before the mother placed the child up for adoption. See *In re Application of S.R.S. and M.B.S.*, 408 N.W.2d 272 (Neb. 1987).

experience himself in the paternal role. Because, as shown above,<sup>225</sup> expectant fathers frequently develop strong bonds with their offspring and experience their identities as parents even before birth, the court's assumption reflected dated notions of the father's role in procreation. The strongest justification for the statute was the compelling need to clear title to the child in order to provide assurance to adoptive parents that the birth father would not appear later to demand a right of redemption.<sup>226</sup> But that interest could have been served by means less draconian than the termination of the father's rights five days after birth. The state might have protected the birth father, without excessive cost, by requiring that the father be notified of the birth and be informed that failure to file within a short, but reasonable period—say, several weeks—would result in loss of paternal rights.

A California case from 1995, *Adoption of Michael H.*,<sup>227</sup> displays an equally troubling attitude. The unwed father, Mark, displayed many indications of prenatal bonding. Even during the first few months of pregnancy, when he and his girlfriend were intending to place the baby for adoption, Mark demonstrated attachment to the fetus.<sup>228</sup> He attended birthing classes, purchased items for the baby, and made financial contributions. He went to his girlfriend's medical appointments, and purchased a videotape of the ultrasound.<sup>229</sup> He reported that after seeing the ultrasound, he "began to warm up to the idea of fatherhood" and suggested that they "just go straight through with it" and keep the child.<sup>230</sup> After the fifth month he consistently opposed adoption. His girlfriend, however, moved to California and arranged a private adoption.<sup>231</sup> Mark checked into a rehabilitation hospital and decided to quit using drugs, seek stable employment and residence, and continue with counseling. Lacking money to hire an attorney, he researched the law himself and filed a pro se petition for custody.<sup>232</sup> Eventually he found an attorney willing to take the case free of charge. When he found out through his attorney that the baby had been born, he immediately asked for custody, sent out birth announcements, and bought a car seat, a crib, and baby clothes. He established a home, maintained steady employment, and continued to seek custody of the baby against the claims of the putative adoptive parents, who were attempting to terminate his parental rights.<sup>233</sup> He sought visitation with the child, but the adoptive parents refused to allow it. The trial court found that Mark had "fought unyieldingly" for custody, that his efforts were "nothing short of impressive," that he had "acted with a tenacity that demonstrates undeniable commitment and speaks well of his ability to weather the frustrating demands of

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225. See *supra* Parts I & II.

226. See *Friehe*, 545 N.W.2d at 743.

227. 898 P.2d 891 (Cal. 1995).

228. See *id.* at 893.

229. See *id.* at 904 (Kennard, J., concurring and dissenting).

230. *Id.*

231. See *id.* at 893.

232. See *id.* at 901 (Kennard, J., concurring and dissenting).

233. See *id.* at 904.



parenthood," that he "never wavered in expressing his desire to take full responsibility of fatherhood," and that he "incessantly, relentlessly" urged his lawyers to seek visitation.<sup>234</sup>

Nevertheless, four years after the child's birth, the California Supreme Court held that Mark had no constitutional right to block the adoption and that his parental rights should have been terminated under the California statute.<sup>235</sup> The rationale was that he had not "promptly" come forward to demonstrate a full commitment to his parental responsibilities.<sup>236</sup> The decision might be justified on the ground that the best interests of a four-year-old child would not be served by being taken away from the only parents the child had ever known. But the four-year delay in adjudicating parental rights was hardly the biological father's fault. It was a problem with the judicial system. It seems unfair that the court should blame a twenty-year-old man for not having come forward on day one to take paternal responsibility, in light of his extraordinary efforts, under adverse conditions, beginning at the fifth month of pregnancy.

It is difficult to discern any public policy that could be served by a draconian requirement that an unwed father come forward immediately to take responsibility, without time for reflection or advice. The mother had three or four months notice that the father opposed the adoption and wanted to take custody of the child. There was no danger that adoptive parents would take a child and then be surprised when a previously unknown biological parent appeared to seek custody. The court blamed the father for the law's delay and thus abdicated its own responsibility. While the result may have been in the best interests of this particular child, the articulated rule fails to accommodate and recognize the importance of paternal bonding.

Other issues bearing on paternal bonding in adoption surfaced in a recent decision from West Virginia.<sup>237</sup> After the birth mother became pregnant and informed the potential father, she moved to California. The father could not locate her, but apparently suspected that she intended to put the child up for adoption because he obtained an injunction *in absentia* against her doing so.<sup>238</sup> The mother gave birth and put the child up for adoption. A Canadian couple adopted the baby and took him back to Canada. By the time the birth father found out, the six-month period for challenging adoptions under Canadian law had expired, and the birth father was left without any legal means to recover his child.<sup>239</sup> Eventually the birth father was able to obtain a judgment against the birth mother and her family, awarding damages for conspiring to hide the child. Although an award of damages may have been the court's only recourse, it

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234. *Id.* at 905.

235. *See id.* at 901.

236. *Id.*

237. The case is described in *Man Wants Son, Not Millions: Court Ordered Damage Payment to Father as Victim of Adoption Without Consent*, CHARLESTON GAZETTE, July 28, 1998, available in 1998 WL 5965084.

238. *See id.*

239. *See id.*

appears to be a rather Pyrrhic victory for a man who had evidenced from the very beginning—even before the child's birth—that he wanted to exercise his paternal rights and objected to the child's adoption.

Taken as a whole, the adoption cases illustrate a somewhat more receptive attitude towards the potential for paternal bonding than the abortion cases. We may infer that the courts apply a model in which the father's bond with a child becomes cognizable after birth, but is still seen as less powerful than the mother's for a period of time. The father must establish his rights by acknowledging paternity and coming forward to act in a parental role. The Court in *Caban v. Muhammad* was quite explicit about this model. In upholding the father's claims, the Court rejected the argument that there was "any universal difference between maternal and paternal relations at every phase of a child's development."<sup>240</sup> In so doing, the Court did not dispute that in the earliest phases of childhood, the mother's bond may be stronger: "Even if unwed mothers as a class were closer than unwed fathers to their newborn infants . . . this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased."<sup>241</sup>

Although the Court in *Caban v. Muhammad* properly acknowledged the father's capacity for bonding with older children, the implication of minimal paternal involvement during infancy is unfortunate, given the social science research demonstrating that fathers establish bonds with their offspring even before the moment of birth. As in the abortion area, many of the adoption cases may be correctly decided; what is disturbing is not so much their results, but their failure to give sufficient weight to the importance of early paternal bonding.

### C. Custody and Visitation

When adjudicating matters of custody and visitation, courts routinely look to the degree of bonding with the adult figure as an important element in determining the best interests of the child. For judicial purposes, "bonding" occurs as a result of "the parent's personal and emotional investment and the relationship that develops from that investment."<sup>242</sup> Bonding thus has two elements: the individual's emotional connection with the offspring, and his or her self-concept as a person whose existence is defined in part, by the parental role. The relationship between bonding and the best interests of the child consists, at least in part, on the fact that an adult who bonds with a child is likely to be an empathetic and understanding caretaker, and is more likely to sacrifice his or her own interest for the child's benefit than someone who has not bonded with the child.<sup>243</sup>

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240. 441 U.S. 380, 389 (1979).

241. *Id.*

242. *State of West Virginia ex rel. Roy Allen S. v. Honorable Robert B. Stone*, 474 S.E.2d 554, 562 (W. Va. 1996).

243. *See, e.g., State of Utah in the Interest of H.R.V. and B.P.V. v. S.V.*, 906 P.2d 913 (Utah 1995).



If bonding occurs between parent and child, courts will err on the side of awarding parental rights, even in the face of countervailing factors, such as a history of violence between the parents<sup>244</sup> or a lack of biological parenthood.<sup>245</sup> When both parents have bonded with the children, courts ask which parent has developed the stronger bond,<sup>246</sup> although they are less willing to engage in a comparative analysis when the dispute is between a parent and a relative such as a grandparent.<sup>247</sup> The presence of a strong emotional bond between a non-custodial parent and child may be sufficient to prevent the custodial parent from disrupting that bond by relocating,<sup>248</sup> and may even be sufficient to support a transfer of physical custody.<sup>249</sup> Conversely, when a biological parent has failed

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[I]t is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.

*Id.* at 916-17.

244. See, e.g., *Neff v. Neff*, No. 73094, 1998 WL 433386 (Ohio Ct. App. July 30, 1998) (father awarded visitation despite the history of violence between the parents, in light of the strong parental bond between father and child).

245. See, e.g., *Buness v. Gillan*, 781 P.2d 985 (Alaska 1989) (recognizing that the man who was not the child's biological father could obtain custody in the dispute with the biological mother, in light of the fact that the man had been the child's primary caretaker and had developed a strong psychological bond with the child); *W.C., In the Interest of A.M.K., a Child*, 907 P.2d 719 (Colo. Ct. App. 1995) (rejecting the biological father's claim to paternal rights when the mother's husband had bonded with the child for a substantial period); *In re Christopher S.*, 662 N.Y.S.2d 200 (N.Y. Fam. Ct., Dutchess County 1997) (wife held equitably estopped from asserting ex-husband's lack of biological parenthood as a defense to petition to obtain primary residential custody, when wife had agreed that ex-husband would enjoy parental rights over child and strong parental bond had formed between child and ex-husband).

246. See *Vissicchio v. Vissicchio*, 498 S.E.2d 425 (Va. Ct. App. 1998) (primary physical custody awarded to the mother, *inter alia*, on the ground that the mother had stronger bond with the child).

247. See, e.g., *Dodge v. Dodge*, 505 S.E.2d 344 (S.C. Ct. App. 1998) (evidence of a strong bond between child and grandparents and stepfather held not sufficient to rebut presumption that custody would revert to the father on death of the mother); *Duncan v. Howard*, 918 P.2d 888 (Utah 1996) (upholding award of custody to the biological father over maternal grandparents, even though emotional bond between the child and the father was not found to be strong). At least this is true if the biological parent has not previously lost custody. See *State of Utah, in the Interest of H.R.V. and B.P.V. v. S.V.*, 906 P.2d 913 (Utah 1995) (parental presumption did not apply when the parent had previously lost custody). *Cf. Troxel v. Granville*, 120 S. Ct. 2054 (2000) (recognizing superior due process rights of mother in visitation dispute with father's parents in case of a child born out of wedlock).

248. See, e.g., *Ramos v. Ramos*, 687 So.2d 280 (La. Ct. App. 1997) (denying mother's petition to relocate, in part because of father's bonding with child).

249. See, e.g., *Burr v. Emmett*, 670 N.Y.S.2d 637 (N.Y. App. Div. 1998) (transferring

to bond with a child, the courts may terminate parental rights,<sup>250</sup> and award them to foster parents or other custodians who have established such bonds.<sup>251</sup> However, if a bond does exist between parent and child, courts are usually loath to terminate parental rights altogether, even if the parent displays undesirable qualities<sup>252</sup> or engages in illegal acts.<sup>253</sup>

Bonding can be established by a variety of forms of evidence. Psychological tests of the capacity for bonding have been utilized in a few cases, but courts tend to be skeptical of their statistical validity and wary of the possibility of manipulation.<sup>254</sup> Testimony by mental health professionals will usually be admitted if offered,<sup>255</sup> especially the views of court-appointed psychologists or psychiatrists<sup>256</sup> and social caseworkers.<sup>257</sup> Fact witnesses may testify about the nature of the bonding they observed between adult and child.<sup>258</sup> Factors that

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custody to father when mother relocated to California).

250. See, e.g., *In the Interest of F.G. et al., Children*, No. A98A1441, 1998 WL 344486 (Ga. Ct. App. June 29, 1998) (terminating incarcerated father's parental rights over twin daughters, inter alia, on ground that the children had been in foster care since they were two months old and had not bonded with the father); *In re B.M., Juvenile*, 682 A.2d 477, 480 (Vt. 1996) (in upholding termination of father's parental rights, court suggested that the "most important fact" was the lack of a "significant relationship or bond" with the daughter); *In re Dependency of J.W.*, 953 P.2d 104, 107 (Wash. Ct. App. 1998) (noting finding of fact that child did not know father and had no significant bond with him).

251. See, e.g., *In re Jessica Lynn B.*, 1997 WL 576413, at \*15 (Conn. Super. Ct. May 13, 1997) (terminating rights of biological parent and noting that Department of Child and Family Services hoped to place child with foster parents for adoption); *In re Robert F.*, 1996 WL 512619, at \*6 (Conn. Super. Ct. Aug. 27, 1996) (terminating parental rights and noting that child's foster parents were bonded with him and wanted to adopt him); *In re the Dependency of K.R. and R.J.*, 904 P.2d 1132, 1137 (Wash. Ct. App. 1995) (en banc) (terminating parental rights and noting that child had bonded with foster parent).

252. See *State ex. rel. Juvenile Department of Multnomah County v. Wyatt*, 579 P.2d 889, 890 (Or. Ct. App. 1978) (mother's behavior was "willful, hedonistic and totally self-indulgent").

253. See *id.* at 891 (prostitution).

254. See, e.g., *In re Wyatt*, 579 P.2d at 891 (refusing to terminate mother's parental rights based on MMPI results that correlated with parental abuse); *In re B.M., Juvenile*, 682 A.2d 477, 481 (Vt. 1996) (criticizing trial court's reliance on results of Minnesota Multiphasic Personality Inventory (MMPI) and Parenting Awareness Skills Survey (PASS) tests showing that father had egocentric personality and weak capacities for empathy).

255. See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 649 N.E.2d 1344, 1347 (Ill. App. Ct. 1995) (citing testimony of clinical psychologist that father had strongly bonded with child and that continuation of the relationship was essential to the child's ability to develop long term relationships in the future).

256. See, e.g., *Keese v. Keese*, 675 So.2d 655 (Fla. Dist. Ct. App. 1996); *Joe v. Lebow*, 670 N.E.2d 9 (Ind. Ct. App. 1996).

257. See, e.g., *In re Jasmine S.*, 68 Cal. Rptr.2d 24 (Cal. Ct. App. 1997) (citing testimony of family social workers).

258. See, e.g., *In re the Marriage of Steven M. Roberts and Jennifer L. Roberts*, 649 N.E.2d

indicate bonding include whether the parent acts in a loving and considerate way to the child, is physically affectionate, consistently keeps scheduled visitations, acts as a significant caregiver, spends time with the child, and engages in enjoyable and appropriate activities with the child. In a few cases, the courts have inquired into other indicia of early bonding. For example, a parent's experience of observing the fetus by means of ultrasound technology has been influential in a few decisions.<sup>259</sup> However, this type of evidence appears sporadic and is only infrequently offered by counsel as bearing on bonding.

Although the courts have established criteria for determining the existence of bonding in custody and visitation that are ostensibly gender-neutral, their application is not. As Eleanor E. Maccoby and Robert H. Mnookin demonstrate in their study of divorce in California,<sup>260</sup> the courts in that state continue to award custody preferentially to mothers, even though the written law establishes no preference for either parent. When both mother and father request sole physical custody, the courts favor the mother by a four-to-one margin;<sup>261</sup> in cases where the mother requests sole physical custody and the father requests joint custody, the courts grant the mother's wishes more than twice as often as the father's.<sup>262</sup> Maccoby and Mnookin conclude that even though gender differences have been formally eliminated, they continue to operate throughout the judicial system: "[T]he actual custodial outcomes still reflect profound gender differentiation between parents: the decree typically provides that the children will live with the mother."<sup>263</sup>

Many factors are at play in the custody determination, and one should not infer from mere disparity of result that the courts are evidencing bias against men. On the other hand, the courts do appear to continue the traditional

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1344, 1347 (Ill. App. Ct. 1995) (citing testimony of friends who supported the father's claim to have a close and supportive emotional bond with the child); *Tucker v. Tucker*, 910 P.2d 1209 (Utah 1996).

259. See, e.g., *Adoption of Michael H.*, 29 Cal.Rptr.2d 251, 252 (Cal. Ct. App. 1994) (father "arranged for a videotape of [mother's] ultrasound showing the developing child"), *rev'd*, 877 P.2d 762 (Cal. 1995); *In the Interest of J.J., a Minor*, 615 N.E.2d 827, 829 (Ill. App. Ct. 1993) (concluding that mother had "good bonding" with her baby before pregnancy, in part because she "could see the baby on the video screen during sonographies, and asked questions regarding the parts of the baby").

260. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

261. See *id.* at 104 (mothers received sole physical custody in 45.3% of the cases and fathers received sole custody in only 11.3% of the cases; in the remaining cases, custody was either joint or split).

262. See *id.* In such cases, courts awarded custody to the mother 66.4% of the time and joint custody 28.2% of the time. The courts granted the father's request on an equal basis to the mothers only when the mother requested joint custody and father requested sole custody: here, 42.9% of the cases resulted in sole custody for the father and 42.9% of the cases resulted in sole custody for the father. See *id.*

263. *Id.* at 114.

approach to custody, which views the mother as the presumptively fitter parent, especially if the child is of "tender years."<sup>264</sup> A key premise of the traditional approach is that fathers play a secondary role in parenting when the child is very young. The tender years doctrine not only favors the interest of the mother during a child's early years, but also presumes that the mother is more firmly bonded with the child during this period. Even in later years, courts return to early childhood as the most important period for the establishment of a parent-child bond.<sup>265</sup> Fathers may thus face a lethal combination of a judicial perception of weak paternal bonding in early childhood, coupled with the proposition that the strongest bonds are formed in early childhood. This approach reflects stereotypes about fatherhood that are not supported by the recent social science research.

To counteract traditional stereotypes, courts and counsel might usefully consider types of evidence that bear on whether a father has established a bond with his child during pregnancy or early childhood. A checklist can identify many of the facts a court might admit, such as:

1. Did the father play an active role in pregnancy planning and/or pregnancy prevention?
2. Did the father indicate a desire for a baby?
3. Did the father display an interest and involvement in the pregnancy from an early point?
4. Did the father accompany his partner on visits to the physician to monitor the pregnancy? Did he review and attempt to understand the results of testing such as ultrasound, amniocentesis, or CVS?
5. Did the father participate in unusual steps to achieve conception?
6. During pregnancy, did the father show symptoms of couvade—appetite disturbance, headache, toothache, weight gain, nausea, indigestion, irritability, food cravings, and the like?
7. Did the couple experience a perinatal loss? If so, did the father manifest objectively verifiable grieving behaviors?
8. Did the father participate in prepared childbirth classes?
9. If the baby was adopted or born through surrogacy, did the father participate?
10. Was the father present during labor and delivery?
11. Did the father hold the child soon after birth?
12. Did the father report a feeling of being fascinated, joyful, or "in love" with the newborn?
13. Did the father take time off from work to be with the baby?
14. Did the father show signs of postpartum emotionality, such as irritability, insomnia, tearfulness, or depression?
15. Did the father participate in the decision as to bottle versus breast feeding? Did he help in the feedings themselves, for example by bottle

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264. *Id.* (describing the tender years doctrine in California).

265. See, e.g., *In re B.M., Juvenile*, 682 A.2d 477, 482 (Vt. 1996) ("[T]he early years of a child's life are critical to forming a parent-child bond . . .").

feeding the child or by bringing the baby to the mother?

16. Did the father display a strong interest in the baby's growth, capacities, and reactions to external stimuli?
17. Did the father participate actively in diapering, bathing, soothing and holding, walking in a stroller, clothing, burping, feeding, and so on?
18. Did the father help create a space for the newborn, such as a nursery?
19. Did the father increase care-taking around the house in order to assist the mother—for example, by taking over more of the cooking, dishwashing, laundry, or housekeeping duties?

Obviously, this list is not exclusive, nor should the presence or absence of any particular factor dictate any particular outcome. Moreover, in cases where the children are older, subsequent events play an important role. Nevertheless, adjudication in the area of family relations might be enhanced by a more explicit consideration of early paternal bonding.

### CONCLUSION

This Article has considered the importance of paternal bonding during pregnancy, childbirth, and early childhood. I use the metaphor of couvade to highlight men's potential in this area. Drawing on scholarship from the fields of anthropology, sociology, history, psychology, psychiatry, nursing, and medicine, I argue that men have the capacity to develop two important kinds of bonding with their offspring: emotional connection with the child or fetus and paternal role identification.

Paternal bonding can begin at conception, or even earlier if the couple is actively involved in procreation (for example through the use of new reproductive technologies). Once conception has occurred, the bonding process accelerates, as indicated by phenomena such as couvade symptoms, the pronounced paternal grief reactions in perinatal death, and even male responses to abortion. New medical imaging technologies such as ultrasound facilitate paternal bonding by providing a "window on the womb" through which the expectant father can view the future child. Fathers' involvement in birth has increased with the advent of prenatal classes and changes in hospital policies that now encourage them to be present during labor and delivery. Fathers experience a profound feeling of engrossment when they hold and caress their newborns. Changing attitudes about gender and flexible work environments allow fathers to spend more time playing with and caring for their infants than in years past.

Paternal bonding intersects with the law in three principal areas: abortion, rights of unwed fathers over adoption, and custody and visitation. Across these doctrinal areas, we observe the courts applying an implicit model of paternal bonding that deviates in some respects from the model that can be extracted from the social science literature. In the judicial model, paternal bonding is principally a function of time. Virtually no paternal bonding is recognized during pregnancy. Some degree of paternal bonding is recognized as to infants, but unless the father is actively involved with and takes responsibility for the baby, the law may discount his attachment. For older children the law recognizes that fathers can have equal bonding with their children as mothers, but looks to a

limited set of facts to determine whether bonding has occurred. The standard evidence introduced in courts does not include extensive inquiry into whether the father established deep bonds with his offspring in pregnancy or early childhood.

This Article has argued that courts should revise their concept of early paternal bonding, in order to accommodate a more realistic model that recognizes both the father's capacity to adjust his self-concept to include the paternal role, and his emotional connection with his offspring. Such an analysis could signal a constructive engagement with changing conceptions of fatherhood and with the rapidly growing body of scientific knowledge about men and procreation.

# SEPARATING SUPPORT FROM BETRAYAL: EXAMINING THE INTERSECTIONS OF RACIALIZED LEGAL PEDAGOGY, ACADEMIC SUPPORT, AND SUBORDINATION

CHRIS K. IJIMA\*

*If we have learned anything at all, it has to be that power and politics are not separate or different from teaching. They are at the heart of it.<sup>1</sup>*

## PROLOGUE

When I was a beginning instructor in the New York University School of Law's Lawyering Program, its renowned Director, Professor Anthony Amsterdam, periodically gave teaching workshops to the entire Lawyering faculty. In one of the first workshops, as I was still struggling to decipher the volume of materials I was expected to digest (the detailed outlines of the exercises, the requirements of the various assignments, the comprehensive teaching notes, and the intricacies of the NYU personnel forms), he said something almost as an aside that nevertheless struck me as a revelation (Tony

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\* Assistant Professor of Law and Director of the Pre-Admission Program, William S. Richardson School of Law, University of Hawai'i-Manoa. I would like to thank the students in my spring 1998 Critical Race Theory course at Western New England College School of Law who gave me permission to use their reflection papers in this piece, my students in my Second Year Seminar class at the William S. Richardson School of Law, and my students who are with me in the Pre-Admission Program—all of whom allowed me the opportunity to talk about and explore issues that too often get paid little or no attention in law school, and from whom I learned a great deal.

Also, thanks go to my colleagues at the William S. Richardson School of Law who have been so warm and welcoming to me and my family, particularly Professors Eric Yamamoto, Casey Jarman, Calvin Pang, Mark Levin, and Danielle Hart (now a professor at Southwestern University School of Law) whose suggestions for this piece as well as for my work in general, encouragement, and inspiration have been a source of so much support. Thanks also goes to Ms. Frieda Honda who has provided me with invaluable secretarial help, wisdom about what to do and what not to do around the law school and around the island, and absolutely priceless information about where the "ono" food is—on O'ahu and the Big Island.

Finally, I want to acknowledge someone with whom I have never spoken, never corresponded, and never met—the late Professor Judy Weightman, the Director of the Pre-Admission Program at the William S. Richardson School of Law from 1988 until her untimely death in 1998. Professor Weightman left a rich legacy for me and the rest of the Pre-Admission students with her societal vision and always compassionate approach to the issues that face legal education. Because she was so busy with many important projects both inside and outside of the law school, she never systematically recorded her approach to the Pre-Admission Program. However, parts of her vision were recorded on various pieces of paper found in her office and files, and most importantly, the results of her vision are found in the lives, successes, and memories of the many Pre-Admission students and alumni who had the great fortune of studying with her. The Pre-Admission Program and the law school miss her greatly, and her work at the law school has provided the inspiration for this piece.

1. LOUISE HARMON & DEBORAH POST, CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING 202 (1996).



used to refer to these epiphanies as “the shock of recognition”). As he was explaining the pedagogic focus of the first fall writing assignment, he contended that ideally no case should be taught to a student without the student first asking him or herself the question, “Who am I?” He asserted that it was only from the perspective of the lawyer’s context—i.e., the particular interest of the client, the stage of the litigation, the jurisdiction of the court, etc.—that a student could appreciate the real meaning of the authority. It dawned on me then, that I had certainly never learned the “who” of legal analysis in my first critical year of law school when I was supposed to learn how to “think like a lawyer.”

Later, after I had left the NYU Lawyering Program to teach at Western New England College School of Law, I was given the opportunity to teach a course on Critical Race Theory. I asked my students periodically to write “reflection papers”—essays expressing their personal thoughts about what we had been discussing or reading in the previous class.<sup>2</sup> One of my students wrote in her first paper:

When I told my favorite undergraduate professor that I intended to pursue a law degree, I could not understand the look of concern that clouded his expression. During [Critical Race] class on Friday, I finally realized his concern. Professor Engel was concerned that I would lose my spark and would quietly accept every “neutral, legally correct” principle that passed my way. He did not believe that . . . law school would hone my analytic abilities so that I could continue to challenge; he assumed that I would get lost in the “neutral” principles.

Professor Engel was one of my favorite political science professors because he always challenged viewpoints. . . . This necessarily involved delving into where we obtain our beliefs and values and why we hold them dear.

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Ultimately, Professor Engel taught me a great deal about myself. In the end, I realized the personal is political. Law is not immune to this fact. The law is what the majority (in every sense of the word) says it is, and it carries with it the assumptions of the majority. Thanks to Professor Engel, however, I am usually able to see the assumptions behind the so-called neutral principles. Many times during the first year I found myself questioning the reasoning of the opinions I read. Yes, I admit that I acquiesced to these principles in order to do well on exams,

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2. This was an assignment to which I had been introduced by Professor Paulette Caldwell who graciously allowed me to audit her class at New York University School of Law when I was an instructor in the Lawyering Program there. Although Professor Caldwell’s class was the first time I had experienced the technique, the methodology has been first attributed to others such as Professors Patricia Cain, Derrick Bell, and Charles Lawrence. See Frances Ansley, *Starting with the Students: Lessons from Popular Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 7, 19 n.26 (1994).

but I have not lost my ability to question the assumptions from which they flow. I enrolled in Critical Race Theory hoping that I would finally be in a class where these assumptions could and would be challenged. Our first class left me with this thought, "I can't wait to tell Professor Engel."

### INTRODUCTION

Professor Mari Matsuda once observed that it was the mediocre law students who tried to make law co-extensive with reality, and it was the law students who were able to detach themselves and see it "as a system that makes sense only from a particular viewpoint," that excelled.<sup>3</sup> It follows, then, that in order for students to observe from a particular vantage point, they must first acknowledge and value where they are presently standing. Thus, as I mature as a law teacher, engaged in my own existential, personal, and professional searches for who I am, part of that journey has also become a search in the pedagogy of my profession for some indication that we collectively are concerned about where each of our student's "who" is.<sup>4</sup>

The need for recognizing the importance of teaching within a larger societal and professional context is multileveled. It is an analytic and methodological concern (Tony Amsterdam's reference to the advocate's context). Further, perhaps more importantly, we have a responsibility to teach legal analysis with reference to the larger societal context. That is, we should try to give students a better understanding of what law is, and whose interests and what values it may serve. If we would put what we teach in a better context, we would teach better. If we could teach better, we could ultimately train more competent and compassionate lawyers.<sup>5</sup>

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3. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 299 (1992). Law school promotes an internalization of "detached cynicism" as a value in which legal issues are depersonalized and detached from questions of justice. Catharine Pierce Wells, *American Association of Law Schools Symposium: Bringing Values and Perspectives Back into the Law School Classroom: Practical Ideas for Teachers*, 4 S. CAL REV. L. & WOMEN'S STUD. 1, 2 (1994) (quoting Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, S. CAL. REV. L. & WOMEN'S STUD. 53, 68-69 (1994)). On the other hand, "who we are and what we care about is inextricably intertwined with where we come from, what we know and how we are educated." *Id.* at 6. The experience of legal education is too often "disheartening and disempowering," and the belief that lawyers can lead lives that are "socially useful and personally fulfilling" too often gets lost while acquiring a law school education. *Id.*

4. "Between law teacher and law student there is a silent conspiracy to preserve . . . 'the taboo against knowing who you are.'" Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L. J. 444, 456 (1970) (quoting ALAN WATTS, *THE BOOK* (1967)).

5. This is not only a question for American legal educators. As Professor Mark Levin observes in his essay discussing legal education in Japan, the responsibility of all educators is to "consider our students' futures" and assess what "knowledge skills, and abilities" they must have

Moreover, for those engaged in providing academic support for those students “at risk,” traditional law school pedagogy, particularly as it manifests in most first year curricula, presents an educational and professional dilemma. The mission to help students excel in the narrow confines of law school may be fundamentally at odds with helping students truly understand and appreciate their potential as students of the law, as future lawyers, as members of their communities of color, and ultimately as citizens of the nation and world. Indeed, if the goal of legal academic support programs is simply to “retool” students so that they “fit” within the confines of what traditional legal academia deems to be important and valid, it may exacerbate the very exclusion that many people of color and other marginalized groups feel from law school and the law itself.<sup>6</sup>

It is critical to emphasize at the outset that I do not equate the populations of the academically “at risk” with law students of color or any other subordinated population, or that each individual student of color reacts to law school in the same way that all others do. Indeed, part of the problem for many law students of color is the stereotype that confronts them about their lack of “belonging” in both the academic as well as the social setting of law school. Rather, my purpose is to explore how legal academic support programs (“ASPs”) might help address the pedagogical premises and problems that affect all students—male and female, white and nonwhite, straight and gay—such that the disadvantages under which

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to not only become professionally competent, but also to “help . . . society blossom as we move in and through the twenty-first century.” Mark Levin, *Legal Education for the Next Generation: Ideas from America*, Hokkaido University Faculty of Law 50th Anniversary Essay Compendium (March 1999) (English translation on file with the author) at 17.

6. Sarah Berger et al., *Hey! There's Ladies Here!!!*, 73 N.Y.U. L. REV. 1022, 1029 (1998). The authors describe the phenomenon of “Quantitative Diversity” in which “inclusion is meant to be quantitative only; diversification is imagined as occurring without making a *qualitative* difference in the newly diversified whole.” *Id.* at 1028 (emphasis added). The authors continue:

In a setting in which Quantitative Diversity holds sway, people typically begin to recognize cultural difference—often as a result of tension or conflict. When this happens, majority group members in positions of authority cite difference as a cause for concern, and respond with efforts to “retool” newcomers so that they can be assimilated or “fit in.” The aim is to make Quantitative Diversity work smoothly and comfortably. The newly admitted group is the object of the retooling effort. Its members are seen as either assimilating to majority norms or resisting dominant ethos.

*Id.* at 1029.

Professor Kathryn Stanchi observes that while “outsiders” (i.e., she defines as “those traditionally excluded from the creation and practice of law”) can certainly succeed in the field of law and become fluent in its language, “to do so, they must assimilate.” Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 n.14, 21 n.83 (1998). For example, she notes that in a study of Temple University Law School students, after the first year women law students tended to “suppress their relational orientation and engage much more frequently in hierarchical, rights-based reasoning.” *Id.* (citing Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 238 (1991)).

some in the law school population work might be better understood and resolved. Moreover, I also want to make absolutely clear that I have known and continue to know many colleagues who teach brilliantly and humanely within the traditional style and canon, and from whom I have learned much about the law and about teaching. I do not advocate here discarding anything except the narrow views that (1) there is only one way to teach or understand law, and that (2) our society's dominant perspectives are privileged over others.

This Article will contend that it is the responsibility of ASPs and its professionals to do more than solely work with students to improve academic performance within the traditional parameters of law school education, or even to work as advocates to change how law is taught. The responsibility of ASPs is also, and most importantly, to be self-conscious critics of the normalized presumptions and biases that underlie much of the way law is taught and of the law itself.<sup>7</sup> In essence, the task of ASPs is to engage in an exploration and exposition about how the ideological and political intersect and influence the pedagogical. It is through this kind of project that the students whom we serve will be given both the tools to understand and excel within "the system," and to enable them to question and change the legal system itself which has historically helped subordinate and devalue the communities and people from which they come.<sup>8</sup> By engaging in this critical project, the ironic result will be that students' performance within the traditional pedagogy will be enhanced because they will have a clearer perspective about how to approach the material and clearer expectations and thus, be more engaged. Of course, this approach proceeds from the threshold understanding and belief that there are students who "are gripping the table in pain, as the racism, sexism, and homophobia of our world resonates through the classrooms in which they are trying to learn"<sup>9</sup>—and more

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7. I do not advocate this without a realization that those taking such positions within law academia may be exposed to some risk because ASPs and those who work in them are often marginalized or treated as afterthoughts in most law schools. See Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 250 (1996) (noting how ASPs are marginalized). However, failure to address, at least in some way, what I believe are the larger issues confronting many of our students may elevate professional self-preservation over our professional duty.

8. Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L. J. 81 (1995):

Since the beginning moments of our nation, racism has been interwoven into our history and our institutions. This means that racism will not be eliminated without fundamental social restructuring and, conversely, that fundamental social change will not occur unless racism is addressed. The legal system is simultaneously an institution permeated by this racial stratification, a critical part of its perpetuation, and an avenue for social reconstruction. In teaching law, we do not simply convey a roadmap of the legal system; by training those who will be the system, we participate in and shape it as well.

*Id.* at 82-83 (footnotes omitted).

9. Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 97 (1995). In an effective

importantly, that we value them.

Part I will review the range of criticisms leveled at traditional legal education. I will focus primarily on those critiques that explore how the lack of a contextualized analysis of the law, the normalized assumptions inherent in the teaching of the law, and the social and political environment within law schools affect the academic performance of students of color and women. Part II will examine the evolving scholarship related to academic support for indications of whether ASPs in law schools reflect and/or address these concerns. In Part III, I will conclude with a few modest proposals about how ASPs could confront the issue of how traditional legal pedagogy contributes to the marginalization of certain law student populations without sacrificing—but rather enhancing—the success of our students within the confines of the traditional curriculum.

### I. THE BASIC CRITIQUES OF TRADITIONAL LEGAL PEDAGOGY

The traditional first year law curriculum has remained unchanged for decades. One commentator has characterized the core curriculum as standing “astoundingly unchanged and unexamined.”<sup>10</sup> It is essentially an exploration of

piece, Brian Owsley wrote about his experiences as an African-American law student at Columbia University School of Law. See Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997). He recounts that he and most of his fellow African American classmates, “never felt as if it was our law school”:

We were made to feel as interlopers in this precious experience who should be eternally grateful. Despite our credentials and academic records, some students still viewed us as thieves stealing a more qualified and talented white student’s rightful place. These views became apparent through passing comments and classroom discussions.

*Id.* at 515.

10. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1515 (1991). Professor Ansley observes:

[L]egal education appears to have been isolated from trends in the rest of the academy in that the core curriculum remains unchanged in all its monumental splendor, its feet firmly planted in the first year curriculum. Despite profound changes in constitutional, statutory, and common law, staggering centralization and elaboration of the state and economy, the development of a new demographic profile in our student body and faculty, and radical alterations in the nature and practice of American lawyering, the basic core curriculum endures.

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[L]egal education is startling in its preservationism. Though occasional serious attempts to restructure law school requirements have been mounted in the past and although some provocative and interesting alternatives are presently being tried, the central courses have continued with remarkable similarity and remarkably little serious challenge.

*Id.* at 1515-16 (footnotes omitted).

For a brief overview of the scholarship that critiques traditional legal pedagogy, see Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the*

some or all of the following subjects in large survey courses: civil procedure, contracts, torts, criminal law, and property.<sup>11</sup> It is usually taught in the so-called “Socratic dialogue style” which has come to mean law professors calling upon individual students to articulate some aspect of an appellate opinion assigned for the day’s class. As the student discusses the case, the law professor gently, or not so gently, guides them through specific issues and analyses within the opinion that illuminate an aspect of applicable substantive legal doctrine.<sup>12</sup> There is generally no individualized feedback except at the end of the semester or year in which one final exam determines the students’ final grade for the course.<sup>13</sup> It

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*Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 315-22 (1997). Lustbader lists factors that may contribute to a student’s difficulties in law school such as isolation, alienation, cultural barriers, lack of gender and racial diversity, and a lack of concern for students’ learning processes. See *id.* While she makes incisive points about how academic support teachers must critique traditional legal pedagogy (see *infra* notes 159-61 and accompanying text), the bulk of this particular article discusses the “Learning Progression: a cognitive theory that explains the evolutionary learning process of law students” and its use as a tool in working with law students. *Id.* at 321.

11. See Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 399 (1998) (observing that the basic first year curriculum—civil procedure, torts, criminal law, contracts and property has been virtually unchanged since it was “heralded as Harvard’s new curriculum—in 1938”).

12. The traditional law school pedagogical model is from the approach pioneered by Christopher Columbus Langdell at Harvard Law School in the 1870s. See, e.g., ALBERT J. HARNØ, LEGAL EDUCATION IN THE UNITED STATES 53-60 (1953); see also David S. Clark, *Tracing the Roots of American Legal Education*, 51 RABELS ZEITSCHRIFT 313 (1987), reprinted in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 495, 501 (Steve Sheppard ed. 1999). The Langdellian model consists generally of the case method (a concentration on the reading and analysis of case law), the so-called “Socratic” teaching style, and an end of the semester final exam. Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670 (1994); see also Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 528 (1998) (noting that in the first year curriculum, “Socratic dialogue dominates law teaching methodology” (quoting Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996))); Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997), reprinted in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, *supra*, at 7, 37 (stating that the casebook and the Socratic dialogue “are overwhelmingly the most popular devices” used in modern American law schools).

Professor Paul Savoy describes the Socratic method utilized today in law school classes as essentially a “set of games.” He describes them as: “Corner” (the professor drives the student into an intellectual corner); “One Up” (the professor is always able to “win” the “dialogue” by evasion or changing contexts); “The Chamber of Horror Gambit” (reducing the student’s argument to an absurd conclusion). Savoy, *supra* note 4, at 457-60.

13. In a tongue-in-cheek essay on the law school experience, Professor James D. Gordon, III, described the law school exam as follows:

Studies have shown that the best way to learn is to have frequent exams on small



is these first year grades that will have a disproportionately powerful impact on the students' eventual law careers for they will determine in profound ways the success of a student's law school career.<sup>14</sup>

### A. *The Critique of Inadequacy*

The immense importance of these grades would be justified if there was assurance that they reflected the acquisition of skills and values that were needed for the successful practice of law.<sup>15</sup> However, legal academia, as well as the practicing bar, has become increasingly uncomfortable about the fact that a student's successful performance within the traditional curriculum may not be a true marker for his or her legal competence or even preparation for professional success in the world outside of law school.<sup>16</sup> So profound was the general sense in the legal community that there was a disjunction between law practice and legal education that in 1989, the American Bar Association formed a task force composed of legal educators, practitioners, and members of the judiciary to study the state of legal education and to recommend improvements.<sup>17</sup>

However, the American Bar Association was certainly not the first to raise concerns about the state of legal education. Indeed, the Legal Realists of the 1930s—Jerome Frank, Karl Llewellyn, Leon Green—attacked “the heart of the Langdellian assumption that the case method was both practical and in the

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amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this. Anyone can learn under ideal conditions; law school is supposed to be an intellectual challenge. Therefore, law professors give only one exam, the FINAL EXAM OF THE LIVING DEAD, and they give absolutely no feedback before then.

James D. Gordon, III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991).

14. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 89 n.243 (1994) (observing that law school examinations and grades determine major law school credentials such as dean's list, law review, honor fraternities, enrollment in specialized programs or classes, prestigious clerkships, and offers from elite firms (citing Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 411-12 (1977))).

15. See Deborah L. Rhode, *Missing Questions: Feminist Perspectives On Legal Education*, 45 STAN. L. REV. 1547, 1557 (1993) (noting that grading practices are calculated to rank students rather than instruct them). Moreover, law schools do not test what they teach. Roach, *supra* note 12, at 669. Professor Roach observed that often professors teach by the case method, but test by the problem method. See *id.* at 673.

16. See, e.g., Savoy, *supra* note 4, at 446 (describing the “unforgivable irrelevance of my legal education to what was happening in my head, in the courtroom, and in the streets of our cities”).

17. THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (commonly known as the “MacCrate Report” after the task force's chairperson, Robert MacCrate, Esq.).



intellectual tradition of German scientism.”<sup>18</sup>

Contemporary critiques of legal education have been made from a number of different perspectives. Some commentators assert that the traditional law school curriculum does not address adequately or comprehensively the range of legal practice.<sup>19</sup> Indeed, they contend that the study of private law is emphasized to the exclusion of other areas of law.<sup>20</sup> Others have expressed concern with the lack of lawyering context in traditional legal education. As one commentator has articulated it:

What law schools actually concentrate on teaching for three years is, first, how to analyze legal doctrine by defining, contrasting, and systematizing the rules from appellate opinions and, second, how to construct policy arguments for opposing sides of cases. . . . Rather than enabling students to exercise these analytical skills in ways that replicate how lawyers actually use them in practice, they are generally taught as abstract casebook exercises devoid of any contextual reality.<sup>21</sup>

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18. ROBERT STEVENS, *LAW SCHOOL, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 156 (1983). Stevens also states:

The major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based upon the objectivity of black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed to be value-free. This change inevitably caused the predictive value of doctrine to be seriously questioned. The vantage point of American legal scholarship was finally established as being process rather than substance.

*Id.*

19. See, e.g., Bob Gordon et al., *Legal Education Then and Now: Changing Patterns in Legal Training and the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 747 (1998).

Put bluntly, at best, the contemporary law school looks at a ridiculously narrow range of legal practice, and even within that range presents almost no explicit theory about how those practices are accomplished. It acts as if law were a normative discipline that could be understood best from an internal perspective.

*Id.* at 755 (remarks of Professor John Henry Schlegel).

Of course, the Realists had similar criticisms decades before. Jerome Frank called upon law schools to become more practical and “repudiate the false dogmas of Langdell.” STEVENS, *supra* note 18, at 156-57 (quoting Jerome Frank).

20. See, e.g., Gordon et al., *supra* note 19, at 758 (“[T]here’s a kind of magnetic north that the needle keeps swinging back to; that is, of all the things that we could be teaching in legal education, why is it that so uniformly and continuously throughout the country, the curriculum centers so heavily . . . on the teaching of private law doctrine?”) (remarks of Professor Robert Gordon).

21. John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1136 (1997). Even law schools’ priority on legal scholarship is misplaced because the social utility of “normative” legal scholarship (“scholarship that prescribes courses of action to resolve

Because the world of lawyering demands that lawyers be able to think in role, use cases and doctrine for specific ends in the service of their clients' interests, and be familiar with a repertoire of different problem solving approaches besides doctrinal analysis.<sup>22</sup> The law schools' three year emphasis on case analysis within discrete casebook defined courses poorly prepares students for the eventual world of practice.<sup>23</sup>

Professor Leslie Bender has articulated the hidden and fictitious messages of first year curriculum as follows:<sup>24</sup>

- (1) legal problems may be divided into seemingly fixed doctrinal categories;
- (2) particularized substantive content is to be emphasized over processes of reasoning, argumentation and law-making, classifications of legal thought more worthy of study than the values contained within it and abstraction more valuable than practical lawyering skills;
- (3) law focuses on "private disputes and litigation";<sup>25</sup>
- (4) since there is a "devotion to appellate cases"<sup>26</sup> in the traditional curriculum, the message given to new students is that attention to specific facts, contexts, and the people involved is nearly irrelevant, and that law is basically

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controversial socio-legal issues") is small given that "the vast majority of law review articles are written for and read by legal academics." *Id.* at 1139-40. Indeed, given the criteria of how legal scholarship is evaluated for purposes of hiring, promotion, and tenure, it is clear that "actual social benefit [is irrelevant] to the enterprise of normative legal scholarship." *Id.* at 1141.

22. See *id.*; see also Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 52 (1998) (asserting that lawyering is "a bundle of expertises each defined by their goals"). Weinstein observes that contrary to more traditional viewpoints, the focus on case book learning may be less rigorous than other approaches: "The traditional conception of thinking like a lawyer corresponds to an identifiable expertise—appellate lawyering . . . [but] the excessive focus on that expertise may be explained by the fact that as hard as doctrinal analysis is to learn, it is easier than manipulating both doctrine and facts at the same time." *Id.*

Lani Guinier suggests that if law schools fail to support alternative perspectives and approaches to learning, the legal profession may be denied "the advantages of creative tension, of innovative ideas, and of solving problems by merging information from diverse sources." Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 13 (1998). Guinier theorizes that legal problem solving requires diverse perspectives and skills, "including the ability to listen as well as speak, to synthesize as well as categorize, and to think hard about nuance and context even when that slows down the decision-making process; insight, especially in team contexts, benefits from the integration of mainstream and marginal viewpoints." *Id.*

23. Elson, *supra* note 21, at 1141.

24. See Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387 (1992).

25. *Id.* at 392.

26. *Id.*

“the search for abstract rules of law and governing principles”;<sup>27</sup>

(5) intellectual priority should be given “to doctrinal categories over processes of law, of change, and over practical skills. . . and that the core of what all lawyers should learn is mostly private common law regulating economic relationships”;<sup>28</sup>

(6) The reality of law is more about doctrine and less about “interactions among individuals in families, in neighborhoods, workplaces, schools, and communities; between groups of people, and between people and institutions. . . .”;<sup>29</sup> and finally,

(7) students “figure out come exam time, they will be asked about contracts, not justice; about torts, not truths; about constitutional doctrine, not substantive equality.”<sup>30</sup>

What law school training, therefore, neglects is in great part, “the dynamics of inevitably working *with* people.”<sup>31</sup> This dynamic happens in the context of “conflicting, uncertain, and unique situations,” the interaction of lay and professional, the influence of cultural and other forces on problem solving, as well as the impact of income and other power disparities.<sup>32</sup> In this way, law is better conceptualized as a multilayered activity, rather than a purely analytical

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27. *Id.* at 393. As Professor Rhode puts it, “[t]hinking like a lawyer” is typically presented as the “functional equivalent of thinking like a law professor.” Rhode, *supra* note 15, at 1559. All legal thinking must be rational, distanced, and detached. *See id.*

28. Bender, *supra* note 24, at 393.

29. “What is troubling in the structure of law school pedagogy has much to do with what is troubling in lawyer-client relationships.” Rhode, *supra* note 15, at 1554. The authoritarian structure of law school and the dynamics of classroom settings offer a “disturbing paradigm” that is replicated in other legal relationships such as those between partner and associate, lawyer and client, professional and support staff. *Id.* at 1556. Law schools’ culture which focuses on analytic reasoning and competition over skills such as respect or empathy also ill prepares students for dealing with clients who may evaluate their satisfaction as much over how they were treated as how much they “won.” Martha M. Peters, *Bridging Troubled Waters: Academic Support’s Role in Teaching and Modeling “Helping” in Legal Education*, 31 U.S.F. L. REV. 861, 863-65 (1997).

30. Bender, *supra* note 24, at 394. The “individualist ethos of legal education is also in tension with the needs of legal practice,” which often requires cooperative process. Rhode, *supra* note 15, at 1557. As Professor Gerald Lopez points out:

Does anyone really expect legal education to seem any different. . . when the very appellate cases that it so regularly attends to are themselves so schematic, ungrounded, and bloodless? . . . In the legal culture the appellate court’s distance from the heat of conflict and from the pathology of failed ventures is hailed as a distinctive virtue—indeed as a principal source of a judge’s authority and the legal system’s legitimacy.

Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 336 (1989).

31. Lopez, *supra* note 30, at 322.

32. *Id.*

endeavor.<sup>33</sup>

The lack of conceptualization of law practice as a multileveled activity affects the culture of the classroom as well. As Professor Deborah Post points out, the prevalent emotion of first year law students is fear:

[F]ear of arbitrariness, the fear of failure, the fear that ensures failure. They are angry and frustrated. They know that success means a splintering of self, a division into the professional and the personal to mirror the dichotomies that dominate the first-year curriculum—theoretical and practical, procedural and substantive, public and private law.<sup>34</sup>

Part of the indoctrination process that occurs during the first year of law school is an infantilization that begins immediately: attendance is taken, official excuses are necessary for absences, students are “called upon” rather than volunteer, leaving the room during class is discouraged. Even within the presentation of the subject matter itself, “hiding the ball” is an accepted teaching technique in which students are kept purposefully in the dark about substantive information. As one student puts it, the experience of law school “was like coming into a movie when it was half over.”<sup>35</sup> This is because, in reality, legal education “does not attempt to educate as much as it attempts to weed out students and to rank the students who remain.”<sup>36</sup> In sum, the law school environment and culture “encourages emotional dysfunction.”<sup>37</sup> According to a

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33. See Weinstein, *supra* note 22, at 7 (noting that clinical legal thought “analyzes law as an activity and attends closely to perspective (role) and context”) (footnotes omitted).

34. HARMON & POST, *supra* note 1, at 194.

35. *Id.* at 160. Professor Vernellia Randall describes the approach of traditional legal pedagogy as the equivalent of spending a semester teaching a student to play the piano by focusing most of the student’s attention on the analysis of sheet music, and at the end of the term having a piano rolled in to have student play a piece of music as the final exam. See Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 65 n.3 (1995).

36. Randall, *supra* note 35, at 66.

37. Iijima, *supra* note 12, at 530. Law students are considerably more dysfunctional in almost all categories of psychiatric distress than the general public, become disproportionately dysfunctional soon after starting law school even if they were within normal psychological ranges upon entering, and experience increasing dysfunction as they progress through their legal education. See *id.* at 525-26; see also Roach, *supra* note 12, at 669 (stating that the Langdellian method promotes psychological and academic distress). Indeed, it is the “nontraditional students” who suffer disproportionately. *Id.* at 670.

In a moving and provocative article, Professor Calvin Pang points out that “the [legal] profession, at its core, faces a spiritual crisis that at least partly explains the unhappiness that marks a significant part of the profession.” Calvin G.C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in a Law School Clinic*, 35 WILLAMETTE L. REV. 241, 248 (1999) (citations omitted). He urges that “[as] law students approach their entry into the profession, they should become aware not only of this crisis but receive guidance on how to survive it and even how to assist in its

study reviewing data on law school student levels of anxiety and depression:

law students almost always reported higher levels of anxiety than comparison groups, including medical students. In some cases, they report mean scores on anxiety measures that are comparable to psychiatric populations.<sup>38</sup>

When the data on law students' levels of depression are analyzed, the results are similar to that of anxiety.<sup>39</sup> There is some speculation that both the selection criteria for law school (certain qualities associated with depression and anxiety such as the need to "achieve"), as well as the socialization process at the law school (the law school environment) may interact to produce heightened psychological distress.<sup>40</sup>

Indeed, there is even evidence that the distress suffered by law students while in school foreshadows what lawyers experience after law school.<sup>41</sup> Indications that young lawyers are increasingly unhappy are mounting. One in four associates quit their first firm after two years and over two out of five are gone by the end of their third year.<sup>42</sup> Almost forty percent of 1988 graduates left after three years and more than forty-five percent of 1994 graduates quit.<sup>43</sup> Attrition at New York City firms averages twenty-five percent, with some firms having a firm-wide forty-one percent attrition rate.<sup>44</sup> This is despite surging starting salaries in New York and California near or above the six-figure mark.<sup>45</sup> Some critics blame this skyrocketing rate on law firm hierarchy's "antiquated thinking."<sup>46</sup> Thus, the lawyer's lack of training in dealing with people may not only affect the relationship with clients and adversaries, but with each other as well.<sup>47</sup> Incapable or unwilling to deal effectively with the problem, the response of many law firms is to deny the morale problems or simply throw more money

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dissipation." *Id.* Pang defines "spirituality" not as a particular religious orientation, but in the inclusive sense of it being the "'better' or 'higher' part of us. It is the part of us that sets us searching for meaning and purpose of life, strives for transcending values, meaning, and experiences, and motivates the pursuit of virtues such as love, truth, and wisdom." *Id.* at 256-57.

38. Matthew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 LAW & HUM. BEHAV. 55, 63 (1999).

39. *See id.* at 67.

40. *See id.* at 70-71. The authors suggest that exploring the levels of psychological distress among law students is warranted due to the large number of lawyers and the powerful influence that they exert upon American society. *See id.* at 56.

41. *See id.*

42. *See* Debra Baker, *Cash-and-Carry Associates*, A.B.A. J., May 1999, at 40, 41 (quoting a National Association for Law Placement survey of associates hired between 1988 and 1996).

43. *See id.*

44. *See id.* (citing a *New York Law Journal* survey).

45. *See id.*

46. *Id.* at 42.

47. *See id.* at 43 (comparing the law firm understanding of people management to the treatment of "Dickensian factory workers").

at the problem by creating financial incentives for staying.<sup>48</sup>

### *B. The Critique of Subordination*

Perhaps most troubling is the fact that the narrow scope of legal pedagogy's focus works to the particular detriment of certain segments of the law school population.<sup>49</sup> As a result of the lack of fit between legal education and practice "a substantial proportion of law students—many, but by no means all of them, women students—experience frustration, or alienation, or both, because of law schools' failure to engage and develop the full range of intellectual capacities necessary to successful and responsible practice."<sup>50</sup> Thus, law schools often fail to develop "the multiple kinds of intelligence" that a diverse population brings to legal education because the hierarchical and competitive design "inhibits the academic and professional flowering of a large proportion of its students, [and] also reflects a counterproductive and all too narrow vision of what lawyers do."<sup>51</sup> This is so for at least two major reasons.

First, law schools are generally not diverse communities. Certainly, the population of law schools is notable for its lack of racial diversity. In 1995, only 13.1 % of full-time law teachers were racial minorities, and minority women suffered a "pervasive disadvantage" in the market for law faculty.<sup>52</sup> While 19.6% of law students were from racial minorities, this is still an overall underrepresentation because much of the growth reflects an increased enrollment of Asian Americans of 235%.<sup>53</sup> Thus, it should come as no surprise that the figures for racial composition in other sectors of the legal community reflect these statistics.<sup>54</sup>

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48. See *id.* at 43, 44.

49. See, e.g., Berger et al., *supra* note 6.

50. *Id.* at 1025.

51. *Id.* at 1040 (citing and quoting LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 13 (1997)).

52. AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* 11 (1998) [hereinafter ABA, *MILES TO GO*].

53. See *id.* at 1-2. However, given that statistic it is also interesting to note that despite the relative surge in Asian American law school admittees, "recent evidence suggests that law schools hire Asian Americans at a lower rate than other minority groups." *Id.* at 11. Moreover, since recent anti-affirmative action court decisions in the 5th Circuit, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)), and California's Board of Regents policy and a later ballot initiative, Proposition 209, all of which effectively banned any racial considerations in admission decisions, the law student admissions of African Americans for the major law public schools of California and Texas dropped by 80%, and 50% for Latinos applicants. See ABA, *MILES TO GO*, *supra* note 52, at 16-17.

54. In 1995, African Americans and Hispanics, for example, represented only 2% and 1.2%, respectively, of the lawyers at the largest firms. See Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support*



Second, traditional curriculum does not engage the full range of diverse intelligences because it fails to emphasize, and in some instances fails even to recognize, the fact that legal work is interactive “requiring narrative, interpersonal, intrapersonal, and strategic intelligences in equal measure with categorizing and deductive reasoning.”<sup>55</sup> Attention to developing these kinds of intelligences would lead to stressing fact sensitivity as much as rule sensitivity. Indeed, disregarding the policy implications of rule interpretations misses “an important means of influencing decisionmakers’ discretion,” and also yields “the responsibility for constructing legal culture that makes practice socially useful and morally fulfilling.”<sup>56</sup> Thus, real world lawyering involves much more intellectual capacity than the traditional law school classroom encompasses.<sup>57</sup>

With all the criticism of law school’s curriculum, the most damning are not those which criticize the distance between what is taught and what must be learned to practice competently and ethically; the most damning are those criticisms about how law teaching obfuscates what law “is” and how that obfuscation exacerbates the alienation of students of color and women from the study of law itself.<sup>58</sup> It is this dynamic that ultimately duplicates and perpetuates the same subordination these law school populations experience in the larger

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*Program*, 12 T.M. COOLEY L. REV. 559, 560 n.6 (1995) (citing Claudia MacLauchlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, NAT’L L.J., Jan. 27, 1992, at 1, 31). Moreover, as of 1995, only about 1% of the more than 25,000 partners in the largest 251 firms in the nation were African American; 44 of them having no partners of color, and 61 of them having only one. *See id.* Racial minorities as a whole make up only 3% of partners at the 250 largest firms. *See* ABA, MILES TO GO, *supra* note 52, at 5. Among the 40,000 federal, state, and local judges only 3.3% are African-American, and 1% are Hispanic. *See id.* at 10.

55. Berger et al., *supra* note 6, at 1061.

56. *Id.*

57. *See id.* at 1061 (citing HARMON & POST, *supra* note 1). The authors point out that certain kinds of intelligence, i.e., logical and mathematical, are stereotypically associated with men while others such as inter and intrapersonal intelligences are associated with women. The latter intelligences are the ones neglected in law school pedagogy. Thus, the authors point out that it is important to balance and integrate different kinds of intelligence so that all can utilize different approaches to legal problems. While it is possible to learn to work comfortably nourished only within the intellectual domains of traditional law school pedagogy, the authors assert that it is preferable “to clear the air of intellectual bias and nourish all of the capacities that matter to well-rounded professional growth.” *Id.* at 1062-63.

58. It has been noted, for example, that even within the curriculum, women’s contributions to the growth of legal jurisprudence have been ignored. *See, e.g.*, Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN’S L.J. 273, 303-04 (1998) (cataloguing the central role women have played in constitutional jurisprudence and noting how those contributions are often marginalized as worth studying only in courses separated from “mainstream legal study”). Owsley noted in his experience as a Columbia law student that blatantly racist comments written in judicial opinions were often considered irrelevant for classroom discussion, although they clearly were relevant to policy issues. *See* Owsley, *supra* note 9, at 522.



society.<sup>59</sup> In fact, the dynamic is reflected in the almost polar opposite views about law and its practice between white lawyers and lawyers of color.

A recent American Bar Association poll found that ninety-two percent of black lawyers believed that the justice system was equally or more racially biased than other segments of society.<sup>60</sup> Yet, more than forty-five percent of white lawyers thought there was less.<sup>61</sup> A minute percentage of black lawyers—less than three percent—either believed that there was very little racial bias in the justice system or had no opinion as compared to almost forty percent of white lawyers.<sup>62</sup>

In a seminal piece on legal pedagogy, Professors Lani Guinier, Michelle Fine, and Jane Balin observed:

The hierarchy within the large first-year Socratic class also includes a hierarchy of perspectives. Those who most identify with the institution, its faculty, its texts, and its individualistic perspectives experience little dissonance in the first year. On the other hand are students who import an ambivalent identification with the institution, who resist competitive, adversarial relationships, who do not see themselves in the faculty, who vacillate on the emotionally detached, “objective” perspectives inscribed as “law,” and who identify with the lives of persons who suffer from existing political arrangements. These students experience much dissonance.<sup>63</sup>

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59. Other segments of the student population experience alienation as well. See Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 LAW & INEQ. 555, 561-62 (1996) (“The absence of a GLB [Gay, Lesbian, or Bisexual] presence in classrooms and throughout law school injures the GLB community. It reinforces our societal invisibility and denies us the privilege of community.”); see also Jennifer Gerada Brown, “To Give Them Countenance”: *The Case for a Women’s Law School*, 22 HARV. WOMEN’S L.J. 1, 3 (1999) (proposing a law school for women “where they perceive themselves not as a foreign element” but as “full members of an institution dedicated to them”); Judith Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 U.C.L.A. WOMEN’S L.J. 81 (1996) (discussing four law school studies at Yale, University of Pennsylvania Law School, Boalt Hall-University of California-Berkeley, and Ohio indicating women experienced great alienation in law school).

60. See Terry Carter, *Divided Justice*, ABA J., Feb. 1999, at 42, 43.

61. See *id.* at 42.

62. See *id.*

63. Guinier et al., *supra* note 14, at 47. The authors note that law school creates the categories that the school then presumes to be sifting. We call this the process of “legitimation.” Those who identify with the norms and goals of the institution and perform accordingly are legitimated through institutional rewards. In turn, the institution is legitimated in its selection criteria by the very fact that these are always those who meet these criteria.

The legitimating process affects students in two ways. First, the institution attempts to legitimate its structural organization and values by formally presenting them to the

Gerald Lopez has observed that the values which the culture of law schools and legal pedagogy assume as a baseline are, in essence, narrow expressions of specific racial, gender, and class experience.<sup>64</sup> These values are ingrained and become self-referential due to the lack of inclusivity and diversity among law school faculties.<sup>65</sup> Thus, many students of color and women are forced to

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student as intrinsic components of "thinking like a lawyer." Thus, the law school transmits the formal structure of the institution by preparing the student for hierarchical relationships (teacher-student is equated with partner-associate, judge-counsel, and lawyer-client) as well as by telling the student that acceptance of these relationships is necessary for effective lawyering.

Second, the student reciprocates in the process of legitimation by accepting the law school on its terms, including accepting as legitimate the system by which the law school evaluates and ranks its students. Implicitly, then, the student recognizes that the law school has the right to rank students, that the ranking must be correct, and that the ranking represents the student's true ability to be a lawyer (at least in relation to the others in his class).

*Id.* at 69-70 (footnotes omitted). See also Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 38 (David Kairys ed., 2d ed. 1990). Professor Kennedy asserts that students respond to the hidden messages of law school in different ways. See *id.* at 56. "They accept the system's presentation of itself as largely neutral, as apolitical, meritocratic, instrumental, [and] a matter of craft," and carve out a separate private life in which their own values become more central. *Id.* at 56-57.

According to Kennedy, legal education supports legal hierarchy by providing it with a legitimating ideology, and structures prospective lawyers into believing that legal hierarchy is inevitable. See *id.* at 56. Moreover, "[t]eachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general" (i.e., from policy analysis). *Id.* "Put another way, everything taught, except the formal rules themselves and the argumentative techniques for manipulating them, is policy and nothing more." *Id.* at 45.

64. Lopez states:

Indeed, in terms of what counts as knowledge, in terms of what's valued as success, in terms of how to behave and advance, and in terms of what's comfortable and familiar along the dimensions of race, gender and class, one could hardly find a better socializing experience for future business lawyers than law schools in this country.

Lopez, *supra* note 30, at 348.

65. Lopez observes:

Whatever else law schools may be, they remain intensely mainstream in terms of race, gender, and class; in terms of how authority is exercised; and in terms of what counts as wisdom and insight. Whatever else law schools may be, they are not where you go to learn about how the poor live, about how elderly cope, about how the disabled struggle, and about how single women of color raise their children in the midst of mediocre schools and inadequate social support. Most of those people never get near making it into law schools, let alone on to faculties. . . . [I]t has not been my experience that law school cultures or law students themselves value what subordinated people may

"retool" themselves to conform to the culture in order to attain the values and cultural outlook that law school and legal practice demand of its members.<sup>66</sup> Accordingly, there is agreement among many legal educators that law schools have failed in any attempt "to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people."<sup>67</sup>

The substantive dynamics of the classroom also have a severe impact on law students of color because the norm of objectivity creates a fiction that the dominant racial perspective is neutral.<sup>68</sup> Students of color are often forced to "stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the 'they' or 'them' being discussed is from their perspective 'we' or 'us.'"<sup>69</sup>

Students of color experience two contradictory phenomenon simultaneously. They experience "objectification," the expectation that they adopt dominant white racial perspectives when discussing minority issues, and "subjectification," the result when students of color express themselves referencing a different racial experience and it is assumed by their professors and classmates that these

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have to teach about the world from which they came or in which they now live. If anything, subordinated people feel pressures in and around law schools to act white, straight, upper-class, and male.

*Id.* at 353.

66. Guinier et al., *supra* note 14, at 59-60 (noting that many female students at the University of Pennsylvania School of Law where Professor Guinier was once a professor "become gentlemen" to the extent that they "aspire to ascend the status hierarchy without necessarily confronting its normative condition along the way" (quoting ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 108 (1992))).

Most of this paper is about a group of women at the Law School who cannot or do not want to "become gentlemen." . . . The first group of women fails academically as well as personally. The second group of women succeeds academically. These are women who do "become gentlemen." Within this category of successful women, there is also a subset who do well but feel alienated. This subset of women resents the sacrifices of self that law school requires them to make. These women perceive that law school is a "game." These women learn the rules in order to play the game, but are acutely aware of the price they are paying.

*Id.* at 82.

67. *Id.* at 99 n.273 (quoting Michelle Fine) (stating further "[i]n the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss. The question is not about women; it is about the political project of law schools, and the price women have to pay to become gentlemen."); *see also* Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 138 (1988) (observing that law schools expect women "to become more like men" in order to succeed).

68. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2-3 (1989).

69. *Id.* at 3.

observations are not objective, but biased and self-interested opinions.<sup>70</sup> The only escape from these twin problems is when their experiences are deemed completely irrelevant to the discussion at which point there is a welcomed invisibility, but an invisibility that often leads to intense alienation.<sup>71</sup> As such, law students of color must often “unlearn patterns of disengagement and alienation.”<sup>72</sup> Furthermore, it is more than isolation in the classroom, it is

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70. *Id.* at 3-9. Owsley describes his reaction as a Columbia law student as follows:

These discussions of race and diversity were occurring quite frequently, and I was somehow always involved in one. In all fairness, I would have to admit that it was a topic that interested and concerned me, so I was open to them on a certain level. Nonetheless, such discussions often caused me a lot of pain and anxiety. . . .

At times, I got so caught up in it all that I became overwhelmed.

Owsley, *supra* note 9, at 523.

71. *See* Crenshaw, *supra* note 68, at 3.

72. *Id.* at 13; *see also* Paula Gaber, “Just Trying to Be Human in This Place”: *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165 (1998). Gaber, inspired by an earlier piece written about the experiences of women at Yale Law School (Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988)), followed up the article ten years later. Sadly, she found that the alienation felt by women law students as originally documented by Weiss and Melling, had not changed in ten years. *See* Gaber, *supra*, at 249. They reported that women’s negative experiences in law school included disrespect from fellow students, feelings of isolation, unequal classroom participation, differential grading patterns, open sexual harassment of women students, and ethnic and racial stereotyping. *See id.* at 170 (citing the AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* (1996)).

It is worth noting that James Barr Ames, an early appointee of Langdell’s at Harvard Law School criticized what he saw as a lack of “virility” in the teaching of law before the Langdellian case method. STEVENS, *supra* note 18, at 54-55 (quoting HARVARD LAW SCHOOL ASSOCIATION, *CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917*, at 130 (1918)). Stevens characterizes the Langdellian “scientific approach” toward legal analysis as a “Darwinian,” survival of the fittest and “machismo” pedagogical approach. *Id.* at 54. Ames is credited, along with Langdell and Charles Eliot the president of Harvard University during Langdell’s deanship, with creating Harvard’s influence among contemporary law schools:

Eliot provided the inspiration and “power in action,” Langdell was its first practitioner and therefore its symbol, and, finally, the talent and perhaps youthful enthusiasm of Ames helped to perfect and perpetuate the system. The case method fulfilled the latest requirements in modern education: it was “scientific,” practical, and somewhat Darwinian. It was based on the assumption of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses. In theory, the case method was to produce mechanistic answers to legal questions; yet it managed to create an aura of the survival of the fittest.

*Id.* at 55 (footnotes omitted); *see also* Gaber, *supra*, at 165 n.3 (noting that an “underlying premise” in Victorian America’s legal consciousness was that law was a “masculine domain” (quoting Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA* 133, 134

also isolation from access to "pivotal survival information" such as outlines, study groups, mentoring from upperclass students that has severe academic consequences for many law students of color.<sup>73</sup>

However, the successful study of law requires a student's engagement in his or her study.<sup>74</sup> For students to be engaged, a supportive atmosphere and the contributions of students from different socioeconomic and cultural backgrounds must be encouraged.<sup>75</sup> Often certain law students are not in the presence of professors from similar backgrounds, and thus they may question whether they can contribute to the profession. This may lead to a loss of confidence which, in turn, consumes energy and time and interferes with the concentration necessary for successful study.<sup>76</sup>

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(Mark C. Carnes & Clyde Griffen eds. 1990))).

Not only was there a distinctly male cast to the 19th century approach to law, but a European one as well. Both Eliot and Ames were influenced by contemporary German educational practices and theories. See Clark, *supra* note 12, at 498-503. Under their influence, Harvard Law School "attempted to embrace a kind of Germanic 'scientism' while retaining an Anglophilic and Anglophonic facade." *Id.* at 503 (quoting STEVENS, *supra* note 18, at 134).

73. Roach, *supra* note 12, at 674-76.

74. See Phyliss Craig-Taylor, *To Stand for the Whole: Pluralism and the Law School's Professional Responsibility*, 15 NAT'L BLACK L.J. 1, 21 (1997). Isolation of students from the larger institution has profound academic, institutional, and psychological ramifications. See Roach, *supra* note 12, at 669. For example, studies have shown that women law students tend to receive grades below those which would be expected, given their entering credentials. See Brown, *supra* note 59, at 2 (citing LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCE OF WOMEN AND MEN 16-27 (1996)).

75. See Craig-Taylor, *supra* note 74, at 21.

76. See *id.*; see also Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 3-4, 74 (1998) (reporting on classroom dynamics in terms of race, gender, and school status in an observational study of eight law schools and finding that there was a correlation between the presence of a teacher of color and greater participation by students of color).

Professor Craig-Taylor also recommends that:

Determining which rules need to be changed in order to level the playing field is a complex process. . . . Constant assessment of resources for and impediments to creating pluralized faculty and student population must be undertaken. This type of assessment must take into consideration hiring practices, curriculum, course offerings, teaching methods, allocation of resources and decision-making, etc. Hopefully, ongoing assessment will help to reveal whether law schools are communicating less than positive messages to outsider groups regarding their value and place within the institution.

Craig-Taylor, *supra* note 74, at 23.

Professor Mertz suggests that "examination of the ways in which class size, teacher and student discourse styles, gender, race, and other factors interacted might yield some insight into how to create an encouraging and inclusive classroom environment." Mertz, *supra*, at 76-77. There is some opinion that it is the use of the Socratic method which contributes to the silencing of women in law school. See Brown, *supra* note 59, at 12-14.

The marginalization of groups within the legal academy is not solely a function of interpersonal or classroom dynamics, but also exists explicitly and implicitly within the substantive curriculum. Professor Judith Greenberg argues that the prevalent, but fictitious and ultimately destructive, assumption that there is a colorblind legal system is replicated in traditional legal pedagogy.<sup>77</sup>

The curriculum, the teaching materials, and the common pedagogical techniques are all structured around the norm of whiteness that is rendered color-blind by the unstated assumption that African American students are fundamentally the same as white students. Race is addressed only through widespread silence. Deeply submerged and in opposition to this assertion of color blindness is the hidden message of the curriculum, materials, and techniques that African American students are inferior and dangerous to white students. These two messages exist simultaneously in the curriculum, in tension with each other.<sup>78</sup>

Thus, the goal of teaching students to “think like a lawyer” has implicit colorblind implications because the expectation is that race is irrelevant in terms of determining whether one is “thinking like a lawyer.” “The phrase ‘thinking like a lawyer’ has meant discovering the underlying scientific principles of the law—principles that are equally available to and supposedly have equal meaning for all students, regardless of race.”<sup>79</sup>

The message that race is irrelevant affects the structure and content of the law school curriculum. Just as colorblind legal jurisprudence contains hidden messages of white supremacy, so too does colorblind legal pedagogy, as has been pointed out by many legal scholars.<sup>80</sup> In a larger sense, the absence of a

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77. See Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 55 (1994) (“[The colorblind] ideal is premised on the assertion that race is irrelevant to individual identity. . . . [and] this norm can be expected to have a significant effect on the treatment of racial issues within law school.”); see also Wells, *supra* note 3, at 3 (“Too often, class discussions assume a white perspective and when this unstated assumption is combined with the equally unstated assumption of perspectivelessness, it does much to reinforce societal patterns of racial subordination.”).

78. Greenberg, *supra* note 77, at 55.

79. *Id.* at 68.

80. See *id.* at 75. Professor Greenberg points out:

[T]he discourse of color blindness supports a belief in law school as a meritocracy, while the discourse of deviance and danger leaves legal academics unsurprised when African American students fail. Second, the ideology of color blindness claims that decisions, including curricular decisions, should be made without reference to race. If African Americans are assumed to be the same as whites, then it is sufficient to discuss only whites in the classroom. Nothing would be added by discussing African Americans. The result is that legal education has needed to change very little to accommodate the presence of African Americans. The ideology of race-blind equality supports the maintenance of the status quo, as does the possibility of African American difference and inferiority. Neither of these discourses admits the possibility of



contextualized vision of how status intersects with the law and how the normalized racial and gender assumptions inherent in neutrality in actuality privileges some students over others.<sup>81</sup>

On the level of content and approach to the substantive material itself, Professor Frances Lee Ansley, among others, has described how substantive law areas, even within the core curriculum, are rich in racial implications but those overtones are rarely addressed or discussed in the traditional law classroom.<sup>82</sup> Moreover, the mere inclusion of racial, gender, or sexual orientation issues into the curriculum is not enough, but rather what is also necessary is the understanding and the acknowledgment of how these issues play out within the law, the society, and the classroom.<sup>83</sup>

It is against this context that ASPs must be considered. Indeed, to the extent that ASPs must deal with subordinated populations among law students, it is critical to address the more difficult gender and racial issues or risk exacerbating the very subordination that disadvantages many in the first instance.<sup>84</sup> While

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difference without inferiority.

*Id.* at 96. See also Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 16 (stating that the nonrecognition of race fosters the "systematic denial of racial subordination" which ultimately perpetuates the subordination).

Professor Wildman observes, "The reality is that if we say race plays no part, then the invisible system of white privilege will inevitably continue." Wildman, *supra* note 9, at 91.

81. Professor Wildman observes legal liberalism's construction that all individuals are similarly situated and that absent unfair treatment, the notion of systemic privilege is left unacknowledged. See *id.* She notes that seeing privilege takes effort for those privileged since it is the norm. See *id.* Moreover, since "each of us lives at the juncture of privilege and subordination" analysis of it is a complex undertaking. *Id.* However, she concludes that teaching and learning in a diverse environment "requires awareness and honesty about systems of privilege." *Id.* at 92.

82. See Ansley, *supra* note 10, at 1521-37; see also Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L. J. 140, 147-55 (1995) (discussing ways to incorporate issues of diversity into the classroom).

83. See Wildman, *supra* note 9, at 89 ("We seek more than mere inclusion of race, gender, and sexual orientation in the law school curriculum. We seek understanding as well."). Even in the first year legal writing courses, the pedagogical emphasis on legal discourse "both reflects and perpetuates the biases in legal language and reasoning." Stanchi, *supra* note 6, at 20.

84. See Greenberg, *supra* note 77, at 51-55 (discussing the participation of minority law students in academic support programs). It has been suggested that one of the goals of ASPs is "to provide a supportive environment for, to enhance the sense of community among, to increase the information flow to, and thus improve the performance of, a group of students who have traditionally been at risk for underperformance." Cerminara, *supra* note 7, at 251. Indeed, the original impetus for academic support programs may have arisen "from the desire to improve the environment surrounding and performance of minority students." *Id.* at 252. Law students of color "have not achieved, in numbers proportionate to their percentage of law students, the traditional indicators of academic success" despite their diligent study habits. Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law*



ASPs have a potentially significant and positive role to play for students of color, the role has potential negative implications as well. It has been observed by Paulo Freire that:

All domination involves invasion—at times physical and overt, at times camouflaged, with the invader assuming the role of a helping friend. . . .

Cultural conquest leads to the cultural inauthenticity of those who are invaded; they begin to respond to the values, the standards, and the goals of the invaders. In their passion to dominate, to mold others to their patterns and their way of life, the invaders desire to know how those they have invaded apprehend reality—but only so they can dominate the latter more effectively. In cultural invasion it is essential that those who are invaded come to see their own reality with the outlook of the invaders rather than their own; for the more they mimic the invaders, the more stable the position of the latter becomes.<sup>85</sup>

Whether ASPs play the role of true “helping friends” or of “cultural conquerors in disguise” depends upon the articulation and implementation of our mission.<sup>86</sup>

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*School*, 31 NEW ENG. L. REV. 739, 739-40 (1997) (discussing a study by the Law School Admission Council, conducted by Linda F. Wightman, *Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men*, LSAC RESEARCH REPORT SERIES (1996)).

85. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 150-51 (1970) [hereinafter FREIRE, *PEDAGOGY*]. Professor Kathryn Stanchi also sees the connection between the teaching of legal writing in the first year to the muting of “outsider” voices:

Indeed, because of the degree of cultural and ideological bias contained in the language of law, legal writing’s effectiveness in teaching that language is directly proportional to its effectiveness in muting outsider voices: the better legal writing is at teaching the language of law, the more effective it is at muting those individuals whose voices are not included in the language of law, and the more effective legal writing is at ensuring that those voices will continue not to be heard in the legal context.

Stanchi, *supra* note 6, at 20.

86. There is much historical precedent for the attempt to retool populations to conform to the dominant norm. The Indian boarding school system established by the federal government in the 1880s attempted to remove all traces of Native American culture. See Robert J. Miller & Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 232 n.38 (1996). Children as young as five years old were taken from their parents, dressed in western style clothes, taught English and beaten if they spoke their own language. See *id.* Captain Richard H. Pratt, the superintendent of the Carlisle Indian Boarding School, is remembered for saying, “[A]ll the Indian there is in the race should be dead. Kill the Indian in him and save the man.” Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 239 (1997) (quoting Richard H. Pratt, *The Advantages of Mingling Indians with Non-Indians*, in *AMERICANIZING THE AMERICAN INDIANS* 260-61 (Francis Paul Prucha ed., 1973)).

## II. THE RESPONSES OF PROPONENTS OF LEGAL ACADEMIC SUPPORT TO THE CRITIQUES

There is a growing presence within the legal academy of ASP services. In a recent conference held in 1997 at Pace University School of Law and hosted by the Law School Admissions Council, the official attendee list had over eighty law schools and educators represented from across the United States and Canada.<sup>87</sup> However, the recognition of the role of ASPs in both helping students simply achieve higher law school grades and helping them understand the nature and effect of law school pedagogy and culture upon them is not entirely clear from either the relevant literature or the orientation of these professional gatherings.<sup>88</sup> The lack of a clear distinction between the two orientations is more than just the acknowledgment of a casual disjunction. If one accepts the pervasive critique that traditional law school pedagogy is fundamentally flawed, then whatever role ASPs play in exacerbating that effect, particularly upon students from marginalized and subordinated populations, is troubling.

Generally speaking, there are two worldviews that have informed the practice of ASP professionals. There are those in the field who candidly and solely advocate that ASPs focus only on the academic performance of students.<sup>89</sup> According to this view, the point of ASPs is essentially to attempt to improve the learning skills of students in order to help them "cope" with law school.<sup>90</sup> The other general outlook is to look to learning theory to create techniques and approaches that either will (1) enhance the learning environment for students participating in ASPs themselves, and/or will (2) change the way that traditional

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87. See 1997 LSAC ACADEMIC ASSISTANCE TRAINING WORKSHOP MANUAL, Attendee List (on file with author).

88. In the interest of disclosure, I should point out here that I did not attend the 1997 LSAC Conference; therefore, it is highly conceivable, even probable, that issues of racial and gender subordination were discussed in many of the workshops. However, I noted that of the twenty-seven workshop topics listed in the manual for the conference, only three might be settings in which a consideration of the intersection of pedagogy and subordination might be explored in a substantive way ("Creating a Culture of Inclusion," "Strategies and Considerations for Empowering Students for the Classroom," and "ASP and the Legal Academy: Where Does ASP Fit Within the Institution?").

This is also not to say that these issues have not been discussed at other gatherings. See Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 844-46 (1997) (describing the emergence of ASP influence on numerous issues from 1992-97).

89. See, e.g., Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 159 (1995) (asserting that while some ASPs may be geared toward "the general well-being of minority students," the main goals are academic ones which "are supposed to help participating students catch up with their classmates and to equip them for success").

90. *Id.* at 161.

law school courses are taught. However, although both approaches deal with immediate issues confronting "at-risk" students, neither completely confronts other issues faced by many students of color both in the classroom and in the institution which can have devastating effects upon their academic performance.

### *A. The Assimilationist Approach*

Consistent with the former perspective is some acknowledgment of positive nonacademic effects of ASPs (more cohesive environment, congruence of academic achievement, greater retention and participation). However, the overall success of ASPs is to be evaluated by focusing on grades because "better grade performance is the single most important purpose of academic support . . . ."<sup>91</sup> In effect, under this approach, the successful ASP is the one which most effectively and efficiently "retools" law students to "cope" with traditional law school culture and its demands.<sup>92</sup>

Professor Ruta Stropus asserts that the point of ASPs is to "target 'at risk' students to help them to understand and master the Langdellian [casebook/Socratic] method."<sup>93</sup> Indeed, the purpose of ASPs' is to "empower students to succeed without disrupting the benefits bestowed by the Langdellian method. . . . The key lies not in abandoning the system, but in learning how to deal with it, understand it, and work within it."<sup>94</sup> According to Stropus, students must understand that "[a]lthough it is true that the Langdellian method derives its origins from white men, it is not true that only white males master the technique."<sup>95</sup> Thus, there is an express advocacy of an acceptance of the traditional pedagogy. Indeed, there is a celebration of it.

There is an obvious appeal to this approach. Good grades mean good jobs. The reason that there are academic support programs in the first instance is because some students are not able to achieve the level of expected performance necessary to excel or even to graduate. Indeed, one might argue that the point of law school is not to feel good about one's self, and perhaps unfortunately, few if any law students would forego the possibility of good grades for a chance at improved self-esteem. In essence, this approach is an acceptance of and a capitulation to the reality that it is a white, male-dominated world and to win one must play the game within the given rules. Nevertheless, there is little hard evidence that ASPs accomplish the limited goal of improving grades even within the confines of the traditional pedagogy.<sup>96</sup>

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91. *Id.* at 196.

92. *See, e.g.,* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 485-88 (1996).

93. *Id.* at 485 (footnotes omitted).

94. *Id.* at 488.

95. *Id.* at 484. Professor Stropus suggests that professors might ease the stress of the Langdellian method by giving it an historical context and explaining its pedagogical goals. *Id.* at 477.

96. *See* Knaplund & Sander, *supra* note 89, at 163 (asserting that "a clear showing of

### B. The Learning Theory Approach

Other academic support professionals, while seeing the need to address legal pedagogy as a whole and its particular effect upon students of color, nevertheless still focus their energy on creating and teaching learning techniques to help students improve their academic performance.<sup>97</sup> They seek to incorporate within ASPs the visions of legal education reformers who advocate changing the ways in which students learn the law by changing the way that law professors teach it. Their authority for evaluating and changing legal pedagogy is rooted in the literature and research on general adult learning.<sup>98</sup> According to this view, by implementing techniques of adult education in law school, the academy will be able to improve its teaching and consequently, improve the performance of its students.<sup>99</sup> As a result, attention is placed primarily on solutions which utilize learning theory for students to "learn how to learn,"<sup>100</sup> by developing effective

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academic benefits flowing from academic support has never been made."'). Not surprisingly, there have been criticisms of academic support programs that reflect similar criticisms of traditional law school pedagogy. See, e.g., Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REFORM 281, 282 (1989). Professor Espinoza states that the "mere existence" of academic support programs is not positive if the message support programs relay is not encouragement and empowerment, but incompetence and the "predictive certainty of failure." If that is the message, then academic support programs are "destined to fail." *Id.*

97. See, e.g., Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law School*, 31 NEW ENG. L. REV. 739, 746 (1997) (stating that the factors that interfere with academic success are: poor writing skills, concerns about finances, overwork, discrimination, and cultural factors). Social isolation is another factor that has a negative impact on law students of color. See *id.* at 757-59.

98. See, e.g., Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 941-42 (1997).

99. See Hess, *supra* note 98, at 941-42. Professor Hess enumerates six principles of adult teaching and learning:

1. Voluntariness (understanding that adults are highly motivated learners and will engage in such activities as discussion, simulation, and small group activities);
2. Respect (fostering mutual respect between students and teachers);
3. Collaboration (engaging students by utilizing cooperative effort);
4. Context (recognizing that adults learn by evaluating information through the context of experience);
5. Activity (acknowledging that the learning process must involve more than passive listening);
6. Evaluation (recognizing the need for effective evaluation of students' learning).

*Id.* at 942-44.

100. Edwards, *supra* note 97, at 760 (citing Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471 (1988)).

study skills, constructing efficient schedules, improving critical thinking skills, and improving writing skills.<sup>101</sup> Since there is evidence that academic counseling provides only short term grade improvement which disappears after the counseling ends, some scholars have urged that academic support programs utilize an “independent learning theory,” which emphasizes ways in which the student learns to self-direct his or her own learning.<sup>102</sup>

However, while both approaches necessarily address the problems some individual students may have coping with traditional pedagogy, they leave unaddressed other fundamental issues that confront legal pedagogy with respect to the *total* learning environment of law students and the educational content they receive from their substantive law school courses. If one were to compare these approaches within the context of the miner’s canary metaphor, the latter is concerned about finding ways which will help the canary breathe, while the former wants to actually breed canaries that will thrive in mines while the levels of toxicity in the atmosphere rise.<sup>103</sup> Neither focuses on how to change the toxic

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101. See *id.* at 764-66; see also Cerminara, *supra* note 7, at 256 (“[ASPs] must concentrate on teaching students how they best learn, providing different learning and studying techniques than the students might otherwise have adopted so that those students are strengthened in future, independent learning efforts.”).

102. E.g., Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771, 786 (1989). Ironically, Wangerin concludes that the Langdellian “Classic Case Method” of instruction, including the use of the hypotheticals method, or reconciling conflicting cases with similar facts, is the most effective way to have students develop independent learning skills. *Id.* at 798-801. Indeed, it is his contention that most modern professors do not engage in the case method style of instruction *enough*. See *id.* at 796. Thus, this approach seems curious and even illogical, and somewhat circular. Wangerin even admits that students will resist the “Classic Case Method” and this resistance will “duplicate the resistance shown by generations of law students” before them but that academic counselors should persevere because as “generations of law teachers can attest . . . students’ initial resistance to use of these techniques begins to break down.” *Id.* at 801. One might characterize this proposed “cure” as giving the patient a stronger dose of the disease.

103. The miner’s canary metaphor is perhaps best associated with Professor Lani Guinier. See, e.g., Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505, 505-07 (1998). The miner’s canary was a canary that was brought into the mines to alert miners when the atmosphere was becoming toxic. Because the canary was more sensitive to the toxicity, its condition provided a warning to the miners when the air was becoming dangerous. Guinier is concerned that our attempt to deal with the problems of inequality in society is akin to miners trying to revive the expired canary rather than trying to fix the poisonous atmosphere that caused the canary’s death in the first instance.

Of course, the miner’s canary metaphor assumes certain premises. The major premise is that the atmosphere is toxic to all if the canary dies. There may be some who might contend that there is nothing wrong with the atmosphere of law schools, and if the “canaries” die it is a natural phenomenon, or some weakness on a particular canary’s part. Thus, some might argue that the idea of law schools is to breed canaries that will be able to breath and survive in a toxic atmosphere. Indeed, it could even be assumed that the atmosphere that kills some canaries is actually the best atmosphere of all because it kills inferior canaries and allows hardier, more deserving entities to

atmosphere in the first instance particularly with respect to negative effects of normative perspective on marginalized student populations.<sup>104</sup> In fact, the desire to change the way in which law is taught, logically implies that there are corresponding values about what law is or by whom and how it should be practiced that are not being sufficiently communicated through the traditional pedagogy.<sup>105</sup>

Even those legal scholars who believe that the underlying purpose of ASPs is to diversify the legal profession as a whole tend to focus inward on the students in ASPs rather than on those aspects of the institution which drove them there in the first place.<sup>106</sup> With respect to working with students themselves,

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live. Perhaps this is what the "survival of the fittest" allusion to Langdellian pedagogy is about. See generally STEVENS, *supra* note 18.

104. See Banu Ramachandran, Note, *Re-reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking from Experience*, 98 COLUM. L. REV. 1757 (1998). Ramachandran asserts that the way to improve women's law school experience is "not primarily by attacking the forms of legal education (for instance, a nonabusive Socratic teaching method), but by imbuing the content of legal education with the critical stance that feminist, antiracist, and antihomophobic work typifies." *Id.* at 1793 (emphasis added).

105. See Cynthia V. Ward, *A Response to Professor Vernellia R. Randall's the Myers-Briggs Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 111, 115 (1995) (observing that "proposals to reform law school education via more skills training are necessarily based upon some fundamental claim about the nature of law practice."). Professor Ward observes that Professor Randall's arguments for an educational reform that would take into account different learning styles must imply a larger critique of law and legal practice. See *id.* at 114. She implicitly criticizes Professor Randall for not expressly linking her pedagogical approach to a larger critique. See *id.* at 120. However, while not a central aspect of her article, Professor Randall does expressly link her perspective to a critique about the racial and class bias of legal education. Randall asserts that the present pedagogical orientation of law schools is positioned from an historical law school population that had "essentially the same background—white, upper-middle class, male—and when the legal system was tailored for the practice of persons from that background." Randall, *supra* note 35, at 66 n.4. She concludes that the legal system should reflect the larger society and its practitioners "must come from diverse cultural, ethnic, and educational backgrounds . . . [such that law schools] must develop a pedagogy that allows those who are not white, upper-middle class males to succeed with the same frequency as those who are." *Id.* Professor Pamela Edwards recognizes the social and ideological difficulties faced by law students of color within the pedagogy and environment of law school, although her primary focus is on solutions to help students study more effectively. See Edwards, *supra* note 97. I should reiterate here that my purpose with this piece is not to advocate an abandonment of incorporating more learning theory into academic support. My only point is that learning theory may be necessary but, by itself, is not sufficient. See *infra* Part III.

106. See, e.g., Lustbader, *supra* note 88. Professor Lustbader notes:

[Law school promotes] exclusivity over inclusivity, individuality over community, economic efficiency over moral or humanistic efficiency, and rights over care-orientation. Many people have argued that the legal system will continue to inadequately respond to a culturally diverse society until a critical mass of diverse



some commentators focus on the development of cognitive structural frameworks to help students organize and retain the information they receive.<sup>107</sup> According to this approach, a major part of the task of academic support faculty is to recognize, acknowledge, and teach to different learning styles through the use of different teaching strategies. In the process students then understand that their learning problems are less personal than institutional.<sup>108</sup> As Professor Paula Lustbader articulates it: "ASP's pedagogical approach is simple: it creates a safe and effective learning environment; is student oriented; reinforces students' logic and values; provides challenges and ways to help them achieve those challenges; responds to student voices; and, as a result of the above, empowers students."<sup>109</sup>

However, as important as concentrating on the creation of an empowered learner is—and it certainly is a necessity—concentrating on the learning environment solely *within* academic support programs can only be a partial solution. ASPs are usually marginalized operations, often not considered a vital or even valuable aspect of the law school's offerings.<sup>110</sup> As such, the exclusive use and identification of alternative pedagogical approaches within ASPs may even serve to stigmatize such approaches within the larger law school population, student and faculty alike, as not "real" or "rigorous" law school education.

Thus, finding ways to empower marginalized populations of students is not solely a pedagogical undertaking, for it has profound ideological and political connotations as well. If the root of some students' alienation lies embedded in the ideological and political underpinnings of the way law is seen by those who

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lawyers and legal academicians enter the system and influence it. The underlying purpose of most Academic Support Programs ("ASPs") is to diversify the legal profession by helping more diverse students gain admission into, remain and excel in, and graduate from law schools, so they can pass a bar examination and gain entry into the legal profession.

*Id.* at 840 (footnotes omitted). See also Slotkin, *supra* note 54, at 569 (focusing on the metacognition learning theory to address the "isolation, language and writing difficulties and socioeconomic disadvantage" of minority students).

107. Professor Lustbader refers to these frameworks as substantive and syntactical schemata. Thus, ASP teachers will have students take relevant information in their lives to help them develop schemata. See Lustbader, *supra* note 88, at 848-51.

108. See *id.* at 856; see also Roach, *supra* note 12, at 682-83, 696 (stressing the importance of teaching through the application of learning theory so that students learn "how to learn," become independent learners, and utilize self-directed learning strategies).

109. Lustbader, *supra* note 88, at 847; see also Paula Lustbader, *Teach in Context: In Response to Diverse Student Voices to Enhance Learning for All Students*, contained in Materials of the 1997 Annual Conference of the Institute for Law School Teaching, TEACH TO THE WHOLE CLASS, EFFECTIVE TEACHING METHODS FOR A DIVERSE STUDENT BODY. Professor Lustbader explores ways to create a more inclusive community through pedagogical approaches such as contextualized learning and teaching strategies such as experiential, writing, or collaborative exercises. For an interesting discussion of her approach to learning theory, see her explanation of the "Learning Progression" in Lustbader, *supra* note 10, at 322-23.

110. See Cerminara, *supra* note 7, at 250 (noting the marginalization of ASPs).



teach and practice it, then the markers by which one evaluates a student's "adjustment" to this alienating and often hostile environment will determine the ultimate effectiveness of the "support" the student receives. Indeed, if one believes that something important may be lost if a student completely adjusts to this environment, then a disjunction between the ideological effect of ASPs on its students and the pedagogical one is, for many students of color, a potentially dangerous one. The solutions to both concerns must be informed by the other to truly empower those whom ASPs purport to serve—particularly those who are law students of color.

ASPs have been seen as performing a variety of roles within the larger institution such as: influencing admissions decisions; providing resources for the larger faculty; building a community which improves the general atmosphere of the institution and profession; influencing pedagogy; and helping students to "adjust to a culture where the students' differences based upon factors such as race, class, disability, gender, and/or sexual orientation, can lead to feelings of stigma, disenfranchisement, and alienation."<sup>111</sup> ASP professionals concentrate much of their energy on the last role because they are well aware of the connection between academic success and "students' feelings of self-worth."<sup>112</sup> Indeed, the alienation from law school culture and values that many students of color experience has a profound effect upon their academic performance.<sup>113</sup> Yet, there is relatively little attention paid to the ways in which ASPs can conceptualize their activity in the other areas of the institution—influencing the pedagogical atmosphere and curricular content of the law school itself.

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111. Lustbader, *supra* note 88, at 842-43 (footnotes omitted).

112. *Id.* at 842 ("ASPs share a common mission: to provide diverse persons access to legal education, help create community, help diverse students succeed and excel academically, and most importantly, preserve students' feelings of self-worth and value.").

113. Lustbader observes that many diverse students express the concern that "in order to succeed they must lose their voices and give up their values." *Id.* at 858. Therefore, she suggests that it is necessary to find ways to allow students "to keep their own voices, so they can become bi-cultural." *Id.* Moreover, because many of them expend energy "just keeping themselves intact and holding their place," there is correspondingly less energy to devote to academics. *Id.* (footnotes omitted). See also Mertz et al., *supra* note 76, at 85:

If all of us possess multiple senses of identity, if all of us at times must translate across diverse "worlds" (perhaps in ways of which we are only dimly aware), then perhaps those for whom these processes are a continuing, urgent necessity can be our best teachers about the way context and identity shape human interactions. . . . One aspect of this perspective that emerges from expertise at crossing contexts is a keen understanding of a kind of multilingualism—that the same person can and often does speak differently in different contexts, so that if we observe her in only one context and imagine that we have a complete picture, we will be mistaken.

*Id.*

*C. Transformative Process Is Both Individual and Environmental*

The tendency to separate the task of giving support to law students of color and the critique and reformation of traditional law school pedagogy and of the law itself is striking in several ways. In the Preface to its publication about Academic Assistance Program, the Law School Admission Council ("LSAC") cites the work of three educators—Paulo Freire, Ivan Illich, and Arthur Pearl—as providing the "principal pedagogical foundation" for its discussion of academic support.<sup>114</sup> The Preface acknowledges Freire's focus on the importance of teachers "meet[ing] students on equal ground"; Illich's admonition to "demystify" the educational experience; and Pearl's emphasis on the necessity to develop a student's "sense of competence and belonging."<sup>115</sup>

The basic content of the LSAC publication is an overview of the issues faced by ASPs, as well as concrete suggestions for how to implement or improve a program.<sup>116</sup> However, the substantive pedagogical focus of the piece is contained in a number of sections. In the chapter dealing with educational theory, the authors emphasize that, to the extent ASP program staff understands cognitive process theory, the programs "will be better able to provide academic assistance services."<sup>117</sup> The rest of the discussion of education theory consists of short descriptions of specific learning skills that the LSAC sees as the areas in which ASPs should focus: reading comprehension, concept analysis, mapping, and metacognition.<sup>118</sup> The section concludes with the admonition that the "primary

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114. LAW SCHOOL ADMISSION COUNCIL, AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS 1-2 (1992) (a report from the Minority Affairs Committee of the Law School Admission Council) [hereinafter LSAC Publication].

115. *Id.*

116. The publication is divided into six chapters and a preface. The chapters are entitled Introduction; Program Implementation; Education Theories and Teaching Techniques; Summer Program; School-Year Program; and Program Evaluation.

117. LSAC Publication, *supra* note 114, at 11. Cognitive process theory is defined by the LSAC as the recognition of two types of mental processes: cognition and metacognition:

Cognitive mental processes are called upon to address the daily problem-solving requirements of life, while metacognitive processes are used to manage, plan, and evaluate cognitive applications. Cognition may be seen as involving at least five separate mental processes: *encoding, inference, mapping, application, and response*.

Further it appears that three types of mentation are critical to the type of advanced learning that is required of law students: data choice (selective encoding), data organization (selective combination), and data relationships (selective comparison).

*Id.* (citations omitted).

118. The LSAC encourages the use of the "ConStruct technique" of teaching reading comprehension in which there are three stages of instruction along with constructions of schematic illustrative diagrams: the first, which asks students to identify relationships between the principal topic and major subtopics (called "superordinate concepts"); the second, in which students are asked to understand the relationship between subordinate concepts and the superordinate concepts; the third stage involving identification of specific material to assist in understanding the concepts

goal of an academic assistance program should be to help students develop the abilities that are necessary to independently proceed with their legal education."<sup>119</sup> Intrinsic to this is the understanding of students' "metacognitive skill levels and the development of strategies to address their learning deficiencies."<sup>120</sup>

It is without question that the major point of providing academic assistance is to enable students to survive and excel in the law school environment. Thus, giving students the tools to achieve this specific goal is and should be paramount. Anything less would be irresponsible.

Yet, intrinsic to and underlying the pedagogical vision of all three of the educators cited by the LSAC is their insistence that the goal of education is to empower students through education to begin the project of *transforming* the larger institutions and society. The notion that academic support and innovation is to transform only students and their learning deficiencies, while leaving the institutions which have contributed to those deficiencies fundamentally untouched, unobserved, and unchanged is antithetical to their work. In fact, part of the process to help students navigate and improve within their environment is the recognition that their participation will help to improve/change the environment itself.

It would be ironic if the interpretation of their writings was to lead to a project whose end result was trying to transform students to adapt, conform, and thereby "succeed" in institutions whose atmosphere may be hostile to them. Pearl, in fact, takes dead-aim at programs and educators who focus solely on "improving" students without questioning the values and approaches of the institution in which they learn: "Throughout this book [*The Atrocity of Education*] we encounter in various guises the educational engineer who would have us upgrade education by doing what we are doing now—only better. . . . This type of innovator tells you *how* to do things, but he doesn't question whether they should be done at all."<sup>121</sup>

Pearl critiques the Upward Bound Program, a program similar in many respects to some ASPs in which high school inner city youth, often of color, are brought to a college campus for a summer to undergo academic stimulation, individual tutoring, and remedial work in preparation for college.<sup>122</sup> Yet, Pearl points out that the need for such programs "can [only] be understood only as a candid admission that traditional educational establishments and approaches have

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identified. *Id.* at 11-12.

Concept analysis is described as comprising "data comprehension, analysis, and retention." *Id.* at 12. Mapping is presented as "a learning strategy that rests on the premise that all text can be structured in a hierarchical fashion." *Id.* (citations omitted). Metacognition is "the examination and understanding of one's own cognitive process. *Id.* at 13.

119. *Id.*

120. *Id.*

121. ARTHUR PEARL, *THE ATROCITY OF EDUCATION* 15 (1972).

122. *See id.* at 21.

failed.”<sup>123</sup> Indeed, according to Pearl, such programs “recapitulated the evils that have befallen the disadvantaged throughout their school career.”<sup>124</sup> His focus on a student’s sense of belonging is, in fact, an express call to action to use education to transform a society and an educational system that “overwhelms, depersonalizes, and renders useless.”<sup>125</sup> Thus, Pearl’s pedagogical premise proceeds from his conviction that those support programs which legitimize the circumstances that cause academic failure in the first instance must be dismantled.

The context of Illich’s admonition to demystify the educational experience is even more radical than Pearl’s and certainly pertinent to the direction and purpose of ASPs. His is a withering criticism of the very notion of curriculum itself.<sup>126</sup> If there is anything within the traditional law school canon that would horrify Illich, it would be the reliance and perpetuation of the universal sacred cow of the first year curriculum of law school.<sup>127</sup> He states:

School sells curriculum—a bundle of goods made according to the same process and having the same structure as other merchandise. . . . The result of the curriculum production process looks like any other modern staple. It is a bundle of planned meanings, a package of values, a commodity whose “balanced appeal” makes it marketable to a sufficiently large number to justify the cost of production. Consumer-pupils are taught to make their desires conform to marketable values.<sup>128</sup>

In Illich’s view the insistence on a rigid curriculum is another mechanism by which societal norms are promulgated to control individual creativity. His vision of the end result of “prefabricated curriculum” echoes much of the contemporary

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123. *Id.*

124. *Id.*

125. *Id.* at 44.

126. See IVAN ILLICH, DESCHOOLING SOCIETY 12 (1971). He states:

Curriculum has always been used to assign social rank. At times it could be prenatal: karma ascribes you to a caste and lineage to the aristocracy. Curriculum could take the form of a ritual, of sequential sacred ordinations, or it could consist of a succession of feats in war or hunting, or further advancement could be made to depend on a series of previously princely favors. Universal schooling was meant to detach role assignment from personal life history: it was meant to give everybody an equal chance to any office. Even now many people wrongly believe that school ensures the dependence of public trust on relevant learning achievements. However, instead of equalizing chances, the school system has monopolized their distribution.

*Id.*

127. Illich’s view is that curriculum is essentially an abstraction disassociated from both learning and competence: “School is inefficient in skill instruction especially because it is curricular. In most schools a program which is meant to improve one skill is chained always to another irrelevant task. History is tied to advancement in math, and class attendance to the right to use the playground.” *Id.* at 17.

128. *Id.* at 41.

criticism of traditional law school curriculum: “[Students] no longer have to be put in their place, but put themselves into their assigned slots, squeeze themselves into the niche which they have been taught to seek, and, in the very process, put their fellows into their places, too, until everybody and everything fits.”<sup>129</sup>

But, perhaps it is Freire who most explicitly admonishes those of us who teach to put our teaching into a larger societal context. According to Freire, while the “teaching task” demands qualities such as intellectual rigor, epistemological curiosity, love, creativity, and scientific competence, it also requires “the capacity to fight for freedom, without which the teaching task becomes meaningless.”<sup>130</sup> This is the context of Freire’s emphasis on “meeting students on equal ground.”<sup>131</sup> He posits a dialectic movement between teachers and students in which teaching and learning become “knowing and reknowing”—learners learning what they do not know, teachers relearning what they knew previously.<sup>132</sup> Understanding this process of teaching demands “political discipline” because democratic education “cannot be realized apart from an education of and for citizenship” which is a political construction demanding “commitment, political clarity, coherence, decision.”<sup>133</sup> Freire observes—echoing the sentiments articulated by Arthur Pearl—that oftentimes dedicated professionals do not perceive that they become agents of “oppressive cultural action” when they emphasize a “*focalized* view of problems rather than [on] seeing them as dimensions of a *totality*.”<sup>134</sup> That is, educators do more harm than good when their attention is directed only at the smaller community which is viewed as a totality in itself rather than seeing it as part of a larger entity.<sup>135</sup> His criticism is directed at “those who do not realize that the development of the local community cannot occur except in the total context of which it is a part, in interaction with other parts.”<sup>136</sup> Deborah Post puts it another way:

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129. *Id.* at 40.

130. PAULO FREIRE, *TEACHERS AS CULTURAL WORKERS: LETTERS TO THOSE WHO DARE TEACH* 4 (1998). Freire states:

To the extent that I become clearer about my choices and my dreams, which are substantively political and attributively pedagogical, and to the extent that I recognize that though an educator I am also a political agent, I can better understand . . . and realize how far we still have to go to improve our democracy. I also understand that as we put into practice an education that critically provokes the learner’s consciousness, we are necessarily working against myths that deform us. As we confront such myths, we also face the dominant power because those myths are nothing but the expression of this power, of its ideology.

*Id.* at 41.

131. LSAC Publication, *supra* note 114, at 1.

132. FREIRE, *supra* note 130, at 63-68.

133. *Id.* at 90.

134. FREIRE, *PEDAGOGY*, *supra* note 85, at 137-38.

135. *See id.* at 138 n.17.

136. *Id.* It is quite predictable that the reliance on the theories of these three educators has

I hope I am teaching a different skill. I want [my students] to think about the relevance of their own values and beliefs to practice; I want them to understand that practice necessarily includes political *and* moral choices. I want them to consider what justice means and to understand the imperatives of justice. We don't talk about justice often enough in law school anymore; we refer to it euphemistically as public policy. . . . Many of my colleagues who some call "outsiders". . . consider the revelation of unstated but powerful assumptions underlying doctrine and theory an important educational objective. And we are accused of teaching something other than law because we do.<sup>137</sup>

The pedagogical lessons, then, of these educators are clear. Merely to groom students—particularly students of color or those at academic risk—to participate “successfully” within the larger environment, particularly when that environment itself may cause a significant portion of the dysfunction is ultimately counterproductive and actually perpetuates and exacerbates the conditions of failure. There is a critical and ongoing necessity to create support environments where alienated or struggling students may experience individualized relief and learn better ways to cope with the peculiar and particular methodology of traditional law school curriculum. However, without concurrently attempting to change the totality of the law school context and atmosphere, the endeavor is naive and maybe even self-defeating. In addition, perhaps ironically, an accommodationist approach will also do no more to improve the perception, as well as the reality, of ASPs’ marginalization from the larger institutions, since it will reinforce the perception that all ASPs really do is to try make the work “easier” for academically struggling students.

### III. ASP PEDAGOGY SHOULD INCLUDE CREATING COMMUNITIES OF COLOR AND TEACHING STUDENTS TO HAVE AND UTILIZE A “MULTIPLE CONSCIOUSNESS”

While much has been written and suggested about improving law schools’

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drawn fire from some in the academic support community. Paul Wangerin criticizes the citation of Freire’s work by the Law School Admission Council because, according to Wangerin, Freire and his followers suggest “students fail principally because of the weaknesses or the wickedness of teachers or the educational establishment itself.” Paul T. Wangerin, *A Little Assistance Regarding Academic Assistance Programs: An Introduction to Academic Assistance Programs*, 21 J. CONTEMP. L. 169, 171 (1995). While Wangerin concedes that “some teachers” within the legal education community may accept Freire’s premises, he concludes, tautologically, that “[i]t probably is safe, however, to say that most teachers in the legal education community disagree on a fundamental level with what clearly is the driving premise of this book.” *Id.* Of course, one would assume that the legal education “establishment”—one which has been criticized for its lack of innovation, sensitivity, and perspective—would not look kindly upon the work of an author whose entire point is to empower students to change entrenched institutions.

137. HARMON & POST, *supra* note 1, at 19-20 (citations omitted).



curricula, the prospect of dramatic and immediate change is probably not realistic, and the struggle to change law schools and, ultimately, how the law is viewed, created, and implemented will be a protracted one.<sup>138</sup> Indeed, only the most optimistic of educational visionaries would believe that the project of influencing the legal academy to alter its viewpoint, perspective, composition, and pedagogy will be easy. Thus, it is important to find areas in which ASPs will be able to influence the larger institution in a more immediate sense while simultaneously participating in the longer range goal of influencing the entrenched pedagogy. There are distinct but related areas in which such attempts may be made without undue institutional structural upheaval.

The first task for ASPs is to advocate that law schools as institutions find systemic ways to build communities which can withstand the pressures of the stigma that attaches to ASP participants, particularly those of color. Second, and perhaps most important, there should be an introduction of a critical analysis of the law and legal institutions—including a critique of law school pedagogy itself—into the substance of support curriculum and the tutorial process itself.

#### *A. Building Communities as Pedagogic Method*

With respect to the building of community, one of the major issues that confront students who are connected to ASPs is that of the stigma—real and perceived—placed upon its participants and collaterally, upon all students of color whether in ASPs or not.<sup>139</sup> Stigma associated with participation in ASPs

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138. The critique of law school pedagogy has not gone unaddressed by those invested in maintaining the traditional approach and worldview. See, e.g., ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* (1998). Professor Austin dismisses critical critiques of law and pedagogy as a “pop culture vision of scholarship and law” or “PC Newspeak.” *Id.* at xvi. According to Austin this state of affairs is brought about by “race separatists” spouting “propaganda,” trivial “Tenured Radicals” or “the feminist movement” that wishes to “[b]alkanize legal education.” *Id.* at 186, 192, 200. This is, of course, in contradiction to the “analytical evaluation, rationality, and objectivity” so valued by Professor Austin (and, one presumes, of which he considers himself to be a model) that he articulates as the “core values” of traditional legal education. *Id.* at xvi. The imminent future would be, according to Austin’s illuminating view, a situation where economic exigencies would allow the “Empire” given its present superior power and influence within the legal academy an unfettered opportunity to close completely the hiring doors to legal academia to these kinds of “Outsiders,” deny tenure to those writing scholarship that does not meet with the “Empire’s” approval, and revoke the notion of tenure itself to discourage those who would do so after receiving tenure and expose them to dismissal for such transgressions. *Id.* at 197-98.

I also note here without further comment: Deborah Post’s cogent observation that “much of what is expressed by white males . . . these days is not reasoning at all but expressions of belief—blind faith, maintained in spite of all evidence to the contrary. Defiance of reason is the response of most white males to any challenge to their power, to their sense of entitlement.” HARMON & POST, *supra* note 1, at 127-28.

139. See, e.g., Cerminara, *supra* note 7, at 255-56 (noting that the label of academic support



is one of the "most frequently discussed issues faced by schools interested in establishing or maintaining an academic assistance program."<sup>140</sup> However, given the social attitude toward affirmative action in general, attitudes toward certain ethnic communities in particular, and given the structure and racial makeup of many ASPs, it is perhaps inevitable that some stigma will attach to students who participate in these programs.<sup>141</sup> Indeed, even the terms of the present dialogue of affirmative action which differentiates and counterpoises "diversity" from "merit" may contribute to the stigma.

Thus, since it may be impossible to eliminate or even minimize stigma entirely, at least for the foreseeable future, it is important to create ways to minimize its effect on the students themselves. While some might argue that the obvious solution to combat stigma is academic success in the traditional sense, it has been noted that "academic assistance programs, which arguably bring greater balance to law school playing fields, are often characterized as 'remedial' if they are marginally successful, or are challenged for providing an 'unfair advantage' if they are very successful."<sup>142</sup> Moreover, the issue of how best to succeed in accomplishing that goal, because perceptions of stigma—both real and imagined—have an effect upon academic performance, is still left unaddressed by identification of the end goal of "success" within the institution.

It would be logical to assume that a sense of group solidarity would function as a protection against the effects of stigma. However, it is important to keep in mind that while participation in community activities may restore a sense of communal identity and self-worth, it may come at the cost of study time. The "culture of resistance" to law school aculturalization "may simultaneously make it possible . . . to survive law school and make such survival more difficult."<sup>143</sup> In fact, some point out that an attempt to recreate community may also have other dangers such as identifying with others so much that a student may feel personally injured, angry, or discouraged if another does not perform well, or may feel overwhelming responsibility about the fact that others' success may ride on their own.<sup>144</sup> In addition, like professors of color, students of color are often doubly burdened with the roles that tokens must often play, and the expectations that are placed upon them that are not placed upon other students.<sup>145</sup>

Despite these dangers, it is important to create and maintain a separate

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itself may be stigmatizing and "[t]hose who participate in academic support programs are often stigmatized.").

140. LSAC Publication, *supra* note 114, at 5.

141. See, e.g., Darlene C. Goring, *Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs*, 84 KY. L.J. 941, 981 (1996) (finding that stigmatization is not a by-product of academic support, but a "systemic component of legal education" that is only exacerbated by participation in such programs).

142. LSAC Publication, *supra* note 114, at 5.

143. Greenberg, *supra* note 77, at 103.

144. See, e.g., *id.* at 103-04.

145. See Espinoza, *supra* note 96, at 291-92 (describing the ways in which people of color are perceived as "symbols for their race" and the pressure that come along with that label).

character between tutorial programs designed to improve law school exam results, and programs designed to make underrepresented populations in the law school community succeed in the environment. Students who are admitted under "diversity rationales" must be viewed as a group of students who are not defined automatically nor primarily as students who are "at risk academically," but as a particular and unique community of students who bring something important and unique to the law school. By lumping diversity students and Academic Support together under one rubric, the cure for stigma may be worse than the disease. Academic support may be important for students of color not because they have less "merit," or because they are more deficient academically, but because the social, pedagogical, cultural, and political environment of law school is more difficult for them.<sup>146</sup>

Peter Alexander has discussed the importance of creating a community among law professors of color within the legal academy.<sup>147</sup> He catalogued the ways in which law professors of color were marginalized, silenced, devalued, and frustrated within their larger institutions through the context of a semi-fictionalized recounting of a conference of legal scholars of color.<sup>148</sup> The conference was entitled "Celebrating Community."<sup>149</sup> He explained how important the notion of having a safe and familial space is for those operating outside the mainstream of the our institutions:

We were a collection of teacher/scholars—most, but not all, of whom were people of color—who came together to celebrate our sameness as well as our diversity. Many, like me, arrived at the conference planning to learn more about . . . scholarship. . . . Others attended the conference because of a fierce need for community and for the opportunity to connect with people who looked like them, thought like them, traveled a professional path that was similar to theirs, and understood them. Everyone at the conference connected with one another, and we celebrated the recognition of our "family" within the legal academy. It was a memorable weekend, filled with shared experiences and a true sense of solidarity.<sup>150</sup>

Yet, as important as it is for teachers and legal scholars of color to experience a sense of belonging in order to function most effectively, the same

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146. "Support programs must focus less on the remedial and more on acculturation." *Id.* at 292.

147. See Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311 (1998).

148. See *id.* at 1312 n.3. It should be noted that "over 30 percent of minorities on the tenure track in 1981 left law teaching by 1987, compared to 17.1 percent of whites." ABA, MILES TO GO, *supra* note 52, at 11.

149. Alexander, *supra* note 147, at 1312.

150. *Id.* at 1327. Law teachers of color, particularly women of color, are often singled out for criticisms that are not leveled against other professors. See, e.g., Owsley, *supra* note 9, at 516-21.

longing must be even more intense for law students of color who are certainly without any of the benefits and privileges of professor status. Moreover, the strength that comes with this particular sense of shared community is not one based solely upon a commonality of racial experience. It is also derived from the sense that it is the structure, dynamic, vocabulary, and values of the *institution* itself that lies at the root of one's professional and personal alienation. An institutional awareness of its own biases cannot be communicated effectively by student-run organizations such as an Asian Pacific Law Students Association, or a Women's Law Student Association. While important as sources of support, these student groups cannot be a proxy for an institutional recognition of inherent contradictions that may exist for some in the student population. Indeed, there has been a proposal to create a separate law school solely for women.<sup>151</sup> In the alternative, there have been proposals to create, within co-ed institutions, separate programs for women or summer programs open solely to women students.<sup>152</sup>

These kinds of proposals suggest that there must be an institutionally-supported mechanism that acknowledges the particular anomalies that law school education contains, as long as traditional legal pedagogy and the racial and gender makeup of law school faculties remain essentially unchanged in the majority of law schools.<sup>153</sup> Indeed, it is the remedial structure and focus of many support programs that may send a particularly negative message.<sup>154</sup> As Professor Cecil J. Hunt, II, observes,

[t]he bitter irony is that an academic support program does not have to be remedial in focus and, therefore, stigmatizing in result. It is quite possible to design, structure, and implement an academic support program that is empowering and challenging in both tone and content. Such programs tend to build minority students up, rather than weigh them down.<sup>155</sup>

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151. See Brown, *supra* note 59, at 1.

152. See *id.* at 35.

153. This does not necessarily mean solely creating a cadre of student tutors who form personal bonds with their charges, although the Pre-Admission Program does use student tutors. See Slotkin, *supra* note 54, at 573-75. If tutors are part of the support system, it is necessary that "role modeling" be on different levels—academic success, personal integrity, community involvement. The point of building community and "role modeling" among students of color should be to create a positive counternarrative.

In 1986, minorities were 3.5% of all tenured law faculty and 11.1% of tenure-track faculty, but as of 1995, only 13.1% of full time law teachers were minorities. See *supra* notes 52-54 and accompanying text.

154. See Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 782 (1996).

155. *Id.* at 783. Professor Hunt describes the academic support program at Touro Law School which was created for all minority law students without regard to statistical indicators, involving participation by minority law professors and minority upper-class students as tutors, where "the

For example, the Pre-Admission Program of the William S. Richardson School of Law at the University of Hawai'i has had a remarkable history in its twenty-four years of operation.<sup>156</sup> It was designed to increase the diversity of the law school's student population such that it reflected the diversity of Hawai'i's population as well to increase the number of lawyers who had a connection to and practiced in Hawai'i's communities that were underserved.<sup>157</sup>

Under the late Professor Judy Weightman, the Pre-Admission Program Director from 1988 to 1998, there was a great emphasis placed upon building a sense of community among the Pre-Admission students, as well as an emphasis placed upon the social responsibility that was implicit in the Program's existence. This is reflected in the connection that many of the Program's alumni and upper level students maintain with those who newly enter the program. Professor Weightman's approach was to combine a tutoring curriculum with a consistent advocacy for the interests of the Pre-Admission students within and graduated from the law school. She also focused on a conscious effort to instill pride, community and identification of Program participants with one another, the communities from which they came, and the graduates of the Program.<sup>158</sup>

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sense of stigma is significantly reduced and the sense of empowerment is greatly enhanced." *Id.* at 783 n.346.

156. As I have only been the Director of the Pre-Admission Program for a short time, it is with a great sense of humility that I describe its past successes as I made no contribution to them.

157. As of 1973, the year before the Pre-Admission Program began, persons of Hawaiian descent represented only 2 percent of the Hawaiian bar, and those of Filipino ancestry less than 1 per cent. As of 1997, Hawaiians or part Hawaiians represented 9 percent of the bar and Filipinos 2 percent of the bar. Despite the still significant underrepresentation of these two groups, much of the increase in the percentages is related to the Pre-Admission Program. Indeed, the matriculation/graduation rate for Program students has ranged from 75% to 100% and is generally comparable to the graduation rates of the law school's other students.

Candidates for the Pre-Admission Program are not eligible to matriculate into the law school under the law school's traditional criteria, but are nevertheless rigorously selected from criteria including among other considerations: LSAT and undergraduate GPA scores, personal motivation, public leadership, social commitment, maturity, history of overcoming disadvantage, exceptional personal talents, work or service experience particularly in providing service to Hawai'i's poor, as well as ethnic background. There is no single factor that overrides any other except that admission must conform to the goals and purposes of the program. Pre-Admission students are selected separately after the bulk of the "regular" admission decisions are made. As such, they do not "take the place" of an applicant who would otherwise have been admitted under the traditional criteria.

158. When I took over the program in 1998 after Professor Weightman's passing, I was immediately struck by the sense of *ohana* (family) within the program, and the students' commitment to it and to each other. I was also struck by how supportive of the program and its students the law school's faculty and administration were. I attribute much of the success of the program to that environment created by the administration and faculty of the law school, to Professor Weightman's vision and energy, and, of course, to the commitment, sacrifice, and ability of the Pre-Admission students themselves.

Although there are students from various ethnic communities among the entire student body of the law school—the William S. Richardson School of Law has the distinction of being one of the few law schools where students of color outnumber white students—it is the students from the Pre-Admission Program who often take the lead in bringing awareness of issues such as those concerning Native Hawaiian rights and the larger social issues to the law school community. Perhaps most significantly, there is a culture and tradition within the Program that emphasized the ultimate goal was not solely for Pre-Admission students simply to “do well” or even to graduate, but for Pre-Admission students to *lead* the law school and to work for societal change as lawyers *after* graduation.<sup>159</sup> In 1999 alone, among other noteworthy achievements, a different individual Pre-Admission or former Pre-Admission student:

- \*was the President of the Student Bar Association;
- \*was the Secretary of the Student Bar Association;
- \*published a Note in the University of Hawai‘i Law Review;
- \*was a member of a Regional Championship moot court team;
- \*was selected by the graduates to be the Class Speaker at graduation;
- \*achieved the highest grade in the first year Civil Procedure course;
- \*helped form the first Hispanic/Black Students organization at the law school;

- \*was elected by the entire student body to be the voting student representative on the Faculty Admissions Committee.

In addition, Pre-Admission and former Pre-Admission students were active in Native Hawaiian issues such as the struggle over tuition waivers for Native Hawaiians at the university, and took on active roles in cultural activities such as the law school’s hula halau (which performs at the law school’s official functions including graduation) and organizing trips to the island of Kaho‘olawe, a symbol of Hawaiian sovereignty. Pre-Admission and former Pre-Admission students also volunteered to translate for newly arrived immigrants at the local legal services organization dealing with immigration issues. Finally, Pre-Admission alumni have gone on to become state legislators, judges, as well as successful public and private attorneys.

There is a recently formed Pre-Admission Association consisting primarily of law school alumni who were Pre-Admission students.<sup>160</sup> Their first public function in the spring of 1999, was a memorial commemoration of the contributions of Professor Weightman to their lives and to the legacy of the law school.

This is the kind of function that ASPs can play—to be not only a means of tutorial support, but that part of the institution which sees as its function the performance of a critique of the institution itself. Ironically, it can and should play a counter-narrative role within the law school to help achieve a stronger and

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159. Pre-Admission students after one year in the Program matriculate into the “regular” full-time program.

160. The acronym for the Pre-Admission Association and part of its official name is “PA’A” which in Hawaiian means “firm” and “solid.”

more capable student body even in the terms that the law school itself values. Indeed, ASPs can, and must, simultaneously enable students to function in the traditional environment, and yet stand apart from the institution to engage in a critical analysis of what law and law school is about. This will help law students understand that it is “not them” alone who must “own” the problems of legal pedagogy, but that their law school and its professors must at least share the responsibility.<sup>161</sup>

*B. “Multiple Consciousness” as an Aspect of Academic Support*

This should not only be in the context of creating and supporting “safe” spaces within the institution for students of color, but it should be reflected in the substantive curriculum of an ASP program itself. That is, the ASP curriculum should have some critical analysis of legal institutions and legal pedagogy.<sup>162</sup> It is this component that may be even more important than fostering a sense of community because it is a recognition of the necessity for law students to engage in what Mari Matsuda terms a “shifting of consciousness,” one that “produces sometimes madness, sometimes genius, sometimes both.”<sup>163</sup> In her brilliant piece on multiple consciousness as jurisprudential method, Professor Matsuda articulates how consciousness operating on different levels—as legal formalist, as person of color, as woman, etc.—can aid not only the practitioner, but the law student herself in understanding how the law operates and how it can be utilized.<sup>164</sup> Multiple consciousness is the kind of consciousness that understands the place, function and skills of traditional legal analysis while simultaneously valuing and recognizing experience, emotion, and oppression. It may allow the student of color to do more easily what Matsuda observes law students who excel do—“detach” themselves and approach law from the particular viewpoint demanded by traditional law school pedagogy without sacrificing and placing in

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161. Put another way, “[w]hat I’m proposing is to attack the problem of the perspectivelessness or the apparent neutrality or the abstraction of legal studies by making the classroom into a place where students learn doctrine and legal argument in the process of defining themselves as political actors in their professional lives.” Wells, *supra* note 3, at 4.

162. It is interesting to note that there is scholarly opinion advocating that a component of critical theory be incorporated as a requirement into the first year curriculum, and most particularly in legal writing courses. Professor Karyn Stanchi writes:

Students must learn to use critical legal thinking in the context of lawyering—to use critical thinking in predictive writing, persuasive writing, legal analysis, oral advocacy, negotiation, and client representation. And, students must be exposed to some critical theory at the same time that they are learning conventional legal analysis and language. At a minimum, this would teach students to recognize bias in legal language and would validate students who feel uncomfortable with legal language. It would also educate “insider” students about the limitations and biases of the law and legal language.

Stanchi, *supra* note 6, at 55.

163. Matsuda, *supra* note 3, at 298.

164. *See id.*



conflict the sense of themselves, their community, their lives.<sup>165</sup> As Matsuda puts it, “[h]olding on to a multiple consciousness will allow us [and students] to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge.”<sup>166</sup> This metacognitive process of ordering and contextualizing traditional legal doctrine will not only be helpful with respect to helping students understand material but also to understand their relationship to the material in a more meaningful way.

Professor Paula Lustbader conceptualizes this disjunction in a similar way:

Often, to get the right answer, students must argue that mainstream values are correct. . . . Mainstream values [for example] presuppose that all consumers can shop around and bargain for the best deal because of competition in the marketplace. Unfortunately, that is not reality in a highly class-divided society. Many law students have lived under powerless conditions or are at least more willing to recognize them. However, in order to get the “right” answer, the student must argue to the professor (who statistically most likely has lived in a position of power all his life) that the contract terms are not unconscionable, when the student’s own conscience is telling him or her that the social conditions that force the consumer to sign the contract are patently unfair.<sup>167</sup>

She continues by stating that in teaching students how to “argue for . . . mainstream values, we are not condemning them to a position of having sold out their own value system.”<sup>168</sup> Thus, it is necessary “to be explicit” about how law schools represent reality from a particular perspective and that one of the tasks of future lawyers is to change the system to recognize new and different perspectives and values.<sup>169</sup>

However, “being explicit” and developing “multiple consciousnesses” means more than teachers simply telling their students about the narrowness of the world of traditional legal analysis. It also demands that teachers introduce their students to some of the literature and scholarship that explains how and, more importantly, why that world is so narrow. Legal academic support should

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165. Professor Pamela Edwards describes her law school strategy as follows:

During my first year of law school, not only was I presented with new concepts, but I was also faced with values that conflicted with the strategies and values that had worked well for me prior to entering law school. I knew that it was important to understand how to “think like a lawyer,” however, I did not want to abandon those previously successful strategies and values that seemed to conflict with that learning. I consciously developed what I considered to be a split personality. I would use my “new” knowledge in law school, while continuing to use my old strategies in “real” life.

Edwards, *supra* note 97, at 758.

166. Matsuda, *supra* note 3, at 299.

167. Lustbader, *supra* note 10, at 344 n.73.

168. *Id.* at 346 n.75.

169. *Id.*



include the creation of substantive course material that utilizes the emerging critical scholarship on legal pedagogy. It means convincing students (and perhaps, someday, brethren legal academicians) that understanding the critical approach to pedagogy will help many of them function more effectively and consequently do better academically within the traditional atmosphere of law schools.

Creating community, combatting stigma, and learning better analytical tools are not separate tasks. They cannot be seen or addressed separately for students of color and those who identify with subordinated communities in our society. ASP curriculum and structure should be a critical project that (1) acknowledges the necessity that doing well within the present law school environment, particularly for students from subordinated communities, requires a detachment from a sense of self; (2) has the focus of creating alternative and supportive communities in which students not only feel "safe" but also have a base from which they may seek to affect changes in the institution, (3) offers within the substantive content of the tutorial curriculum itself some critical overview of the law and law pedagogy, and (4) sees the academic support field itself as a critical project for advocating change within the legal academy and the society as a whole.

By recognizing and utilizing the interconnections between these phenomenon in an ASP curriculum and structure, ASPs will better serve their constituency as law students and emotionally healthier human beings. Indeed, our academic support community has an almost fiduciary duty to our students to make sure that in the process of enabling them to swim successfully in the law school institutional current we also teach them that the narrow banks of that particular river do not define and constrain the infinite possibilities of the sea.

#### EPILOGUE

As I was writing this Article and looking through old papers from former students, I happened upon one that, to me, illustrated how so many of the most telling thoughts about our status as people of color are triggered by the everyday and the seemingly mundane. These thoughts we often articulate only to ourselves or to those close to us because we are afraid that these notions may seem irrelevant or even petty. We keep these indelible and powerful reactions quiet because they are unnoticed and unacknowledged by those for whom privilege has become an entitlement, and they are often devalued as the product of an oversensitive disposition if they are ever acknowledged.<sup>170</sup>

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170. Professor Angela Harris describes a faculty cocktail party where after someone had mentioned she could sing, a colleague "happily rambles on about all the 'colored gals' he has known throughout his life who are musical . . . [and another colleague] asks me if I have a good recipe for barbeque sauce." Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125, 128 (1990). Harris describes the relationship between power and knowledge:

People who are members of minority groups have access to at least two perspectives and

One of my former students wrote pieces about being Latina. I remember how incisive she was about the subtleties of racial and gender subordination as she related to us how differently some people would react to her when they saw her in person as opposed to when they knew her only by her married name on the telephone (she usually used her husband's "Anglo" name to identify herself on the telephone).

She wrote one reflection paper in which she began by writing, "When I say 'Viva La Raza' (live the race) or Brown Power, some people, okay, maybe most people would see me as a radical . . . [but it] is a statement used to show pride and can be used as a rally cry for all Hispanics to join together and make a difference." She went on to observe that some think that this kind of sentiment is foolish, and still others "can't stand the way Puerto Ricans display their flag in the window of their cars," particularly on the day of the Puerto Rican Day Parade in New York City. She remembers non-Latino people yelling hostile phrases on that day such as, "If you love Puerto Rico so much, go back where you came from," even though many who celebrated that day were born in New York.

That year, she attended the annual St. Patrick's Day parade in Holyoke, Massachusetts. She saw the Irish flags strewn about the town and noticed the Gaelic signs hung across the balconies of the buildings. Yet, she heard no complaints, no anger, no comments about radicalism. Her friend explained to her that, "everyone is Irish in Holyoke on St. Patrick's Day." And she wondered to herself if there would ever come a time when "on the day Puerto Ricans celebrate their day of pride in their culture and traditions," everyone would want to be Puerto Rican.

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ways of being—the public world of the dominant group and the more private world of the minority subculture. . . . In this sense, political subordination creates an unexpected asymmetry of knowledge. People who are multicultural, happily or not, find themselves with multiple ways of knowing. People who belong to the dominant culture only gain access to these different worlds with difficulty.

*Id.* at 131 (explaining the W.E.B. Dubois concept of "double-consciousness") (citations omitted).



# THE DEVELOPMENT OF AIDS FEDERAL CIVIL RIGHTS LAW: ANTI-DISCRIMINATION LAW PROTECTION OF PERSONS INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS

DONALD H. J. HERMANN\*

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\* Professor of Law and Philosophy, Director of the Health Law Institute, DePaul University. A.B., Stanford University, 1965; J.D., Columbia University, 1968; LL.M., Harvard University, 1974; M.A., Northwestern University, 1979; Ph.D., Northwestern University, 1981; M.A.A.H., School of the Art Institute of Chicago, 1993; M.L.A. (Cand.), University of Chicago.

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## INTRODUCTION

Almost as quickly as Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) infection came to be recognized as a significant medical problem, legal and political authorities recognized that the health care crisis raised significant problems that needed to be addressed by both the public health law and civil liberties law. The public health law concerns were readily apparent in the form of a need for statutory authority to achieve epidemiological objectives, to halt transmission through education and voluntary compliance, and to employ coercive measures where necessary. At the same time, given the potential for discrimination for a medical condition that disproportionately affected minority communities including homosexuals, racial minorities, and intravenous drug users required protective measures aimed at confidentiality and informed consent for HIV-antibody testing. While the individual states developed special legislation that attempted to reconcile public health and civil liberty concerns, the need for national civil rights legislation protecting those affected by HIV-infection and AIDS became increasingly apparent. Initial protection from discrimination was provided to individuals with AIDS and HIV infection by inclusion within the category of persons protected by the Rehabilitation Act of 1973. However, protection was largely limited to prohibitions of discrimination in federal employment and to those employed in organizations receiving federal funding. Some consideration was given to enacting legislation specifically protecting those with HIV-infection or AIDS from unjustified discrimination; however, the political obstacles to enacting specific AIDS-related civil rights legislation appeared formidable. Therefore, the decision was made to develop broad general legislation protecting the disabled from inappropriate discrimination and within this general anti-discrimination legislation to provide protection to persons with AIDS or HIV. This approach to a general anti-discrimination statute resulted in the Americans with Disability Act (ADA). While other legislation such as the Fair Housing Act and the education of the Handicapped Act were interpreted to provide protection for certain specific groups of persons with AIDS and HIV-infection, the general population affected by these conditions have found federal protection from discrimination under the terms of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

Rather than specifically identify particular disease conditions which gave rise

to anti-discrimination protection, the American with Disabilities Act took the form of general legislation and adopted the broad textual language including the use of such terms as “disability” and “physical or mental impairments” and “substantially limits one or more major life activities.”<sup>1</sup> Such broad textual language has resulted in the development of a significant history of administrative agency legal analyses and judicial opinions addressing whether the medical condition and the resulting effects of AIDS and HIV infection qualify the infected individual for protection under the ADA. Issues of legislative history, implementing agency authority, and judicial approaches to statutory interpretation along with medical and scientific evidence have provided the rich texture for a complex history of the undertaking to provide national civil rights protection to persons with AIDS and HIV-infection, whether symptomatic or asymptomatic. Although the United States Supreme Court only recently has undertaken an effort to determine the extent of the protection provided to persons with AIDS and HIV infection, the Court’s opinion did not definitely answer the question of whether all persons with AIDS or HIV infection qualify for protection under the American with Disabilities Act. Broad issues remain as to whether Congress achieved its intent to adopt effective national civil rights legislation protecting all persons with AIDS or HIV infection when it enacted the Americans with Disabilities Act in 1990.

#### I. INFECTION WITH HUMAN IMMUNODEFICIENCY VIRUS

The reported history of HIV and the resulting condition of AIDS began in 1981 with articles in medical journals describing outbreaks of pneumonitis carina pneumonia and kaposi’s sarcoma in homosexual men with apparently malfunctioning immune systems.<sup>2</sup> By 1983, what we now know as HIV was isolated and determined to be the causal agent in producing AIDS.<sup>3</sup>

HIV infection results in selective depletion of the human body’s T-lymphocytes or CD4+ cells, the helper white blood cells, that are a primary part of the human’s immune system.<sup>4</sup> The destruction of the CD4+ cells and the resulting decline in the functioning of the immune system makes the body susceptible to secondary infection.

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1. Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (1994 & Supp. III 1997).

2. See Michael S. Gottlieb et al., *Pneumocystis Carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men: Evidence of a New Acquired Cellular Immunodeficiency*, 305 NEW ENG. J. MED. 1425 (1981); Kenneth B. Hymes et al., *Kaposi’s Sarcoma in Homosexual Men—A Report of Eight Cases*, LANCET, Sept. 19, 1981, at 598.

3. See Francoise Barre-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCI. 868 (1983); John Coffin et al., *Human Immunodeficiency Viruses*, 232 SCI. 697 (1986); Robert C. Gallo et al., *Frequent Detection and Isolation of Cytopathic Retrovirus (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984).

4. See Jay A. Levy, *Human Immunodeficiency Viruses and the Pathogenesis of AIDS*, 261 JAMA 2997 (1989).

During the early history of the AIDS epidemic the course of the disease complex was conceptualized as involving acute or primary infection, initial infection followed by a latent period after which activation of viral reproduction resulted first in AIDS-related complex (ARC) leading to systemic AIDS.<sup>5</sup> The initial infection is often accompanied by fevers, skin eruptions, myalgias, arthralgias, malaise, swollen glands, sore throats, gastrointestinal symptoms, and headaches.<sup>6</sup> These physical symptoms will often subside for a significant period of time. However, when subsequent viral replication becomes significant, the patient often experiences persistent generalized lymphadenopathy (swollen glands) as well as fatigue, skin rash, fever, diarrhea, muscle pain, night sweats, and weight loss.<sup>7</sup> Patients with these symptoms formerly were diagnosed as having ARC.<sup>8</sup> A person can be diagnosed as having AIDS when the person's CD4+ count declines below 200 cells/MM3 of blood or when CD4+ cells comprise less than fourteen percent of the normal total of lymphocytes.<sup>9</sup> With AIDS, the various physical symptoms described above continue, the CD4+ cell count further declines, and the patient experiences various opportunistic infections and diseases such as pneumocystis, carinii pneumonia, kaposi's sarcoma, and non-Hodgkin lymphoma.<sup>10</sup>

Increasingly HIV/AIDS is understood as a continuing spectrum of infection following an established progression which may be delayed by available medication.<sup>11</sup> The initial progression of infection may not be accompanied by observable physical symptoms and, thus, is often denominated as the "asymptomatic" phase. What was earlier thought of as a latency period of time when the virus was inactive, is now understood to involve a migration of the virus from the circulatory system into the lymph nodes with a disappearance of overt physical symptoms, but with measurable viral replication.<sup>12</sup> However, even during this so-called asymptomatic stage, many persons continue to manifest bacterial infections, skin disorders, and lymphadenopathy.<sup>13</sup>

By mid-1997, the CDC reported that 612,078 individuals had been diagnosed

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5. See William A. Haseltine, *Silent HIV Infections*, 320 NEW ENG. J. MED. 1487 (1989).

6. See Robert R. Redfield & Donald S. Burke, *HIV Infection: The Clinical Picture*, 259 SCI. AM. 90 (1988).

7. See Yarchoan & Pluda, *Clinical Aspects of Infection with AIDS Retro Virus*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 112 (DeVita et al. eds., 2d ed. 1988).

8. See Koenig & Fauci, *AIDS Immunopathogenesis and Immune Responses*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION, *supra* note 7, at 61-71.

9. See U.S. Dep't of Health and Human Services, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 MORBIDITY & MORTALITY WEEKLY REP. No. RR-17, Dec. 18, 1992.

10. See THE AIDS KNOWLEDGE BASE 4.1-9 (P.T. Cohen et al eds., 2d ed. 1994).

11. See Michael S. Saag, *Clinical Spectrum of Human Immunodeficiency Virus Diseases*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 205-06 (DeVita et al. eds., 4th ed. 1997).

12. See THE AIDS KNOWLEDGE BASE, *supra* note 10, at 4.1-4, 4.1-8.

13. See *id.* at 4.1-9.



with AIDS in the United States.<sup>14</sup> In 1996, the CDC estimated that there were 239,000 persons living with an AIDS diagnosis.<sup>15</sup> The CDC estimated that there are more than one million HIV-positive people living in the United States, this means that there were more than 750,000 HIV-infected persons who may have been asymptomatic.<sup>16</sup>

## II. HIV-RELATED DISCRIMINATION AND DISABILITY LAW

Discrimination against HIV-infected persons has its origins in a complex of fears, phobias, and prejudices. Fear of contagion is the most often expressed concern by those accused of discrimination. Nevertheless, the fact that persons with HIV-infection may be disproportionately discriminated against as compared to members of otherwise discriminated against groups, such as gay men or people of color, is often cited as a basis for the need of legal protection against discrimination.

The development of legislation to combat discrimination against HIV-infected persons has an equally multi-faceted objective. Such laws have the purpose of ending discrimination against persons with a significant disability and bringing such persons within the economic and social mainstream of American life.<sup>17</sup>

Another significant concern about discrimination against HIV-infected persons arose out of the public health strategies developed to trace and stop the spread of HIV. Educational efforts to change behavior to prevent the transfer of the virus from one person to another and blood testing programs, aimed at informing individuals of their infected status, required the voluntary involvement of potentially infected persons who would be discouraged from such voluntary testing if they feared possible discrimination based on their infected status by those who might learn of it. This concern was reflected in the 1988 Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic that reported:

HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic. Crucial to this effort are epidemiological studies to track the epidemic as well as the education, testing, and counseling of those who have been exposed to the virus. Public health officials will not be able to gain the confidence and cooperation of infected individuals or those at high risk for infection if such individuals fear that they will be unable to retain their jobs and their housing, and that they will be unable to obtain the medical and support services they need because of discrimination based on a positive HIV antibody test.<sup>18</sup>

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14. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, June 1997, at 3.

15. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, Dec. 1996.

16. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, Feb. 1993, at 15.

17. See S. REP. NO. 116, at 2 (1989).

18. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 19 (1988).

Both houses of Congress relatively quickly endorsed the conclusion of the Presidential Commission that:

As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone.<sup>19</sup>

By the time of the issuance of the Report of the President's Commission on the Human Immunodeficiency Virus, the reality of discrimination against persons with AIDS and HIV infection was manifest. Children were excluded from schools because of their AIDS diagnosis,<sup>20</sup> tenants were discriminated against in housing because of their HIV infection,<sup>21</sup> patients were denied medical treatment because of their sero-positive status,<sup>22</sup> and individuals were denied employment or fired because they were determined to be at risk or to have AIDS.<sup>23</sup> Advocates and public interest groups sought to protect persons with AIDS as a basis in existing law or suggested the passage of new legislation. Some states passed legislation to protect the rights of individuals from compelled testing and to provide protection of the confidentiality of HIV testing records or AIDS diagnostic records.<sup>24</sup> At the federal level, civil rights laws provided one alternative. Neither homosexuals nor intravenous drug users, two groups that experienced a high rate of HIV infection, were protected by existing anti-discrimination laws. While there were some efforts to enact a specific HIV-related civil rights law,<sup>25</sup> there were strong views in Congress, voiced by such persons as Senator Helms, which argued against creating any laws creating special rights for persons with AIDS. The public hysteria about AIDS made passage of any protective civil right legislation at the federal level unlikely if not

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19. S. REP. NO. 116, at 8 (1989) (quoting REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 119 (1988)); H.R. NO. 101-485, at 31 (1990).

20. See, e.g., *In re* District 27 Community Sch. Bd., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (involving suit by school age HIV-infected child excluded from public school).

21. See, e.g., *Poff v. Caro*, 549 A.2d 900 (N.Y. Super. Ct. Law Div. 1987) (refusal to rent to an individual believed to be at high risk for AIDS).

22. See, e.g., Rosaline Gagliano, *When Health Care Workers Refuse to Treat AIDS Patients*, 21 J. HEALTH & HOSP. L. 225 (1988).

23. See, e.g., Jane Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987).

24. See, e.g., 1987 ALA. ACT 574; CAL. HEALTH & SAFETY CODE § 199.20-199.23 (West 1989); FLA. STAT. § 381.609 (West 1989); HAW. REV. STAT. ch. 325; ILL. REV. STAT. ch 111½, ¶ 7408 (1993); ME REV. STAT. tit. T, § 17001; MASS. GEN. LAWS ANN., ch. 111 § 70 (West 1989); N.Y. PUB. HEALTH LAW § 2782 (McKinney 1994); 1987 OR. LAWS ch. 600; R.I. LAWS § 5-5-37.3 (1999); WIS. STAT. ANN. §§ 103.15, 146.0231 146.025 (West 1989).

25. See, e.g., S. 1575, 100th Cong. (1987).

impossible. Instead, attention was directed at finding a basis for anti-discrimination protection in existing law. This view, which ultimately prevailed, was adopted in the 1988 report of the President's Commission that urged that "persons with HIV infection should be considered members of the group of persons with disabilities, not as a separate group onto themselves. Persons with HIV infection deserve the same protections as all other persons with disabilities, including those with cancer, cerebral palsy and epilepsy."<sup>26</sup>

Even prior to the recommendations of the Presidential Commission, commentators urged the use of handicap legislation,<sup>27</sup> particularly section 504 of the Federal Rehabilitation Act of 1973,<sup>28</sup> that prohibited handicap discrimination, and state laws that protected handicapped individuals from employment discrimination.<sup>29</sup> Handicap discrimination law seemed an appropriate basis for protection for HIV-infected individuals because these statutes, particularly the federal handicap law, were given broad interpretation by the courts. The courts' interpretations extended protection to individuals vulnerable to discrimination due to impairments that resulted in shunning and avoidance by members of the general society.<sup>30</sup>

### III. REHABILITATION ACT OF 1973

The history of disability law is a relatively short one, beginning approximately twenty-five years ago with the passage of the Rehabilitation Act of 1973.<sup>31</sup> However, the first major federal statute protecting individuals with disabilities was the Social Security Act of 1935<sup>32</sup> that included provisions providing medical and therapeutic services for crippled children. Other legislation was enacted that provided rehabilitation services aimed at employability,<sup>33</sup> handicap accessibility to federal buildings,<sup>34</sup> and mass

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26. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 121 (1988).

27. See, e.g., Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985) [hereinafter Leonard, *Employment Discrimination*].

28. 29 U.S.C. § 794 (1994).

29. See, e.g., California Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE § 12920 (West 1992).

30. See, e.g., *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy a handicap); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977) (individual formerly diagnosed with epilepsy protected because he was regarded as having an impairment); see also Rehabilitation Act of 1973, 29 U.S.C. §§ 790-96 (1994) (epilepsy treated as handicap).

31. 29 U.S.C. §§ 790-96.

32. 42 U.S.C. §§ 301-06.

33. See LaFollette-Barden Act, Pub. L. No. 78-113, 57 Stat. 374 (1943), amended by the Vocational Rehabilitation Amendments, Pub. L. No. 83-565, 68 Stat. 652 (1954) (current version at 29 U.S.C. § 37-42).

34. See Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-57.

transportation.<sup>35</sup>

The most significant initial disability legislation that has had importance in dealing with HIV-related discrimination is the Rehabilitation Act of 1973, which aimed at handicap discrimination in programs involving federal funding.<sup>36</sup> The three major provisions of the statute relating to different aspects of federal involvement in programs included: section 501 which established non-discrimination and affirmative action as employment requirements for federal employers;<sup>37</sup> section 503 which mandated nondiscrimination and affirmative action in the employment policies of federal contractors;<sup>38</sup> and section 504 which mandated nondiscrimination and reasonable accommodation by recipients of federal financial assistance, including educational programs, public accommodations, transportation, and health and social services.<sup>39</sup>

The 1973 Rehabilitation Act protected handicapped individuals who were defined as individuals who could benefit from rehabilitation services.<sup>40</sup> The 1974 amendments to the Rehabilitation Act expanded the definition of handicapped individuals to include any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.<sup>41</sup>

Initially, the passage of the Rehabilitation Act was not followed by strong enforcement. Public pressure compelled the President issue an Executive Order in 1976.<sup>42</sup> This order mandated that the Department of Health, Education and Welfare (HEW) issue regulations implementing the provisions of the Rehabilitation Act. In 1978, HEW promulgated regulations implementing the Rehabilitation Act of 1973 as amended.<sup>43</sup>

The statute's definitional terms were refined by the HEW.<sup>44</sup> The promulgated regulations defined a "physical or mental impairment" as involving the following:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs, respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

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35. See Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. §§ 1601-18.

36. See 29 U.S.C. §§ 790-96.

37. See *id.* § 791.

38. See *id.* § 793.

39. See *id.* § 794.

40. See *id.* § 706.

41. See *id.* § 706(7)(B).

42. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976).

43. See Dep't of Health, Educ., and Welfare, 43 Fed. Reg. 2132 (1978).

44. See Dep't of Health, Educ., and Welfare, 42 Fed. Reg. 22,676 (1977).

- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>45</sup>

The analysis published along with these regulations provided a list of covered diseases and conditions with a warning that the list was not comprehensive.<sup>46</sup> The listed diseases and conditions included "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism."<sup>47</sup>

The HEW regulations further specified that major life activities include, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>48</sup> The term "substantially limits" was not defined in the regulation because it was concluded that an operating definition was not possible.<sup>49</sup>

#### IV. EXTENDING PROTECTION OF SECTION 504 OF THE FEDERAL REHABILITATION ACT TO PERSONS WITH HIV INFECTION OR AIDS DIAGNOSIS

##### *A. Initial Commentary and Department of Justice Opinion*

The initial arguments for extension of the protection of individuals with HIV infection or AIDS under the disability discrimination prohibitions of the Rehabilitation Act of 1973 were presented in law reviews. Arthur Leonard of New York Law School published an article in 1985 entitled *Employment Discrimination Against Persons with AIDS*.<sup>50</sup> Leonard argued an individual with AIDS should be held to be included within the statute's first definition as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities."<sup>51</sup> According to Leonard, infection with HIV constitutes a physical impairment that affected the person's "ability . . . to fight infection and preserve health" that is logically a major life function.<sup>52</sup>

Leonard also argued that a person with AIDS was protected within the third alternatives definition of handicapped individual in the Rehabilitation Act that protects a person who "is regarded as having such a impairment."<sup>53</sup> According

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45. 45 C.F.R. 84.3(j)(2)(i) (1999); *see also* 28 C.F.R. 41.31(b)(1) (where the Department of Justice promulgated identical definition regulations implementing Executive Order 12,250).

46. *See* 45 C.F.R. 84, app. A.

47. *Id.*

48. 45 C.F.R. 84.3 (j)(2)(ii); *see also* 28 C.F.R. 41.21(b)(2).

49. 45 C.F.R. 84, app. A at 310.

50. Leonard, *Employment Discrimination*, *supra* note 27.

51. *Id.* at 691 (quoting 29 U.S.C. § 706(8)(B)(i) (1994)).

52. *Id.* at 696.

53. 29 U.S.C. § 706(8)(B)(iii).

to Leonard, persons who may or may not be infected with HIV, and who were denied employment because of the employer's perception that the person was infected with the virus that causes AIDS, should be held to be protected because such a person falls within the provision of the statute that protects persons who are regarded as handicapped because they are perceived as having AIDS. Thus according to Leonard, asymptomatic HIV-infected individuals, whether or not they were in fact substantially impaired, were protected by legislation whose purpose was to prevent discrimination that took the form of "animus against a class of individuals which unfairly ignores their individual qualifications and is based on prejudicial beliefs about the class."<sup>54</sup> Leonard's understanding of the provisions of the Rehabilitation Act, as well as his understanding of AIDS, allowed him to dismiss the need to establish an impairment resulting from HIV infection at the asymptomatic stage, and to avoid the need to identify any specific life activity significantly impacted as a result of HIV infection. For Leonard, a person who was thought to be infected with HIV was a person thought to have AIDS, a condition by its very nature affected the person's ability to fight infection or preserve health.

A very different view of the coverage of the Federal Rehabilitation Act was taken in the 1986 Memorandum from Assistant Attorney General Cooper on the application of section 504 of the Rehabilitation Act to persons who have or are regarded as having AIDS, ARC, or who test positive for "AIDS antibodies."<sup>55</sup> The 1986 Department of Justice ("DOJ") Office of Legal Counsel Memorandum concluded that section 504 prohibited discrimination based on the disabling effects of AIDS and the related conditions that a person with AIDS can have. On the other hand, the DOJ Memorandum concluded that an individual's real or perceived ability to transmit "the disease" [virus] did not constitute a handicap, and that discrimination on such basis did not fall within section 504.

The 1986 DOJ Memorandum took specific care to distinguish persons with AIDS from those merely infected with the "AIDS virus" based on the formal CDC case definition of AIDS, as of August 1, 1985:

A person is not considered to have AIDS merely because tests show him to be generating antibodies to the to the AIDS virus, *i.e.*, to be "seropositive." Instead a person is not considered to have AIDS even if he is seropositive, and also displays a number of symptoms characteristic of the disease. Rather, an essential element of the definition of AIDS used for reporting purposes by the Centers for Disease Centers ("CDC") is afflicted with one or more of the opportunistic diseases that take advantage of the patient's suppressed immune systems.<sup>56</sup>

The 1986 DOJ Memorandum easily concluded that the disabling effects of

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54. Leonard, *Employment Discrimination*, *supra* note 27, at 696.

55. Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to persons with AIDS, Daily Law Rep. (BNA) No. 122 at D-1 (June 25, 1986) [hereinafter DOJ Memorandum].

56. DOJ Memorandum, *supra* note 55, at nn.16, 17 and accompanying text.



AIDS qualified it as a handicap. Citing the HHS interpretative regulations, the DOJ Memorandum determined that AIDS is a "physiological disorder or condition" affecting the "hemic [blood] and lymphatic" systems and possibly affecting the brain and central nervous system as well.<sup>57</sup> The DOJ Memorandum went on to conclude that this impairment substantially limited a major life activity; namely, the inability of "resisting disabling and ultimately fatal diseases, and may directly cause brain damage and disorders . . . [and] by definition involves the presence of an opportunistic disease, such as *P. carinii* pneumonia, that frequently will entail substantial limitations on major life activities."<sup>58</sup>

While not specifically using the terminology "asymptomatic" in referring to a class of HIV-infected persons, the DOJ Memorandum directed considerable attention to what it characterized as an "immune carrier" or a person who was in the stage of the disease progression in which the infected person was able "to communicate the disease to another person" without otherwise experiencing "the disability effects" of AIDS.<sup>59</sup> The medical consensus today is that there are no immune carriers of the HIV virus. Therefore, we understand that a person who tests positive for the HIV virus is "infected" and "infectious." Previously, some medical authorities maintained that a positive HIV-antibody test meant only that the individual had been exposed to the virus. Ultimately, the DOJ Memorandum asserts there is no distinction to be drawn between an immune carrier and a carrier who will subsequently develop the diseases characteristic symptoms.<sup>60</sup> The DOJ Memorandum concluded that an "immune carrier" would not have a physical or mental impairment: "[T]he carrier's condition—the presence within his body of the active infectious agent—has no physical consequence for him."<sup>61</sup> Moreover, the DOJ Memorandum went on to argue that even if the carrier of the virus had an impairment it does not substantially limit any of the major life activities listed in the "HHS regulation—*i.e.*, caring for [him]self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."<sup>62</sup> Specifically, the DOJ Memorandum rejected the fact that the carrier of the "AIDS virus" was subjected to social or professional discrimination. According to the view of the DOJ Memorandum, a person cannot be regarded as handicapped simply because others shun him; otherwise, personal traits such as ill-temper and poor personal hygiene would constitute a handicap in contradiction to the applicable HHS regulations.<sup>63</sup>

The 1986 DOJ Memorandum drew a significant distinction between HIV-infected persons, for example distinguishing those with physically apparent symptoms and those whose infection was not apparent to the casual observer, in applying the third definitive category of perceived or regarded as having an

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57. *Id.* (applying 45 C.F.R. § 84.3(j)(2)(i) (1984)).

58. *Id.* at n.65 and accompanying text.

59. *Id.* at n.67 and accompanying text.

60. *See id.* at n.71 and accompanying text.

61. *Id.* at n.66 and accompanying text.

62. *Id.* (applying 45 C.F.R. 84.3(j)(2)(ii) (1986)).

63. *See id.* (citing 45 C.F.R. 84, App. A at 310).



impairment. Even though an HIV-infected person ["a person who tests positive for HTLV - - III/LAV antibodies"] does not have an impairment that substantially limits any major life activity, the DOJ Memorandum does conclude: "this person may still be handicapped under section 504 if he is perceived as suffering from the disabling effects of AIDS or ARC."<sup>64</sup> However, the DOJ Memorandum reiterates that neither the ability to communicate the virus nor the incorrect belief that the individual can communicate the virus constitute a handicap. The DOJ Memorandum goes on to concede that in certain circumstances a person who is not infected with HIV may be protected by the Rehabilitation Act even though they clearly do not have any impairment that substantially limits a major life activity. According to the DOJ Memorandum, "[I]f such an individual is inaccurately perceived as suffering from the disabling effects of AIDS or ARC—perhaps because of membership in a high risk groups—this perceived impairment would constitute a handicap."<sup>65</sup>

*B. The Arline Opinion of the United States Supreme Court and  
the Second Department of Justice Opinion*

The United States Supreme Court in 1987 decided the case of *School Board of Nassau County, Florida v. Arline*.<sup>66</sup> The Court held that a school teacher diagnosed with contagious tuberculosis was a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act of 1973.<sup>67</sup> While the Court did not specifically address the subject of AIDS or HIV infection,<sup>68</sup> the opinion in *Arline* played a pivotal role in the development of federal disability law as applied to AIDS and HIV infections because of the communicable nature of HIV.

Gene Arline, an elementary school teacher, was discharged in 1979 by the School Board of Nassau County that employed her after she experienced a third relapse of tuberculosis within a two year period.<sup>69</sup> Prior to being terminated, Arline had twice been suspended with pay in 1978 after testing positive for tuberculosis. At the close of the 1978-1979 school year, Arline was discharged because of her medical condition.<sup>70</sup>

While concluding that the plaintiff suffered a handicap, the district court held that she was not a "handicapped person" within the meaning of section 504 of the Rehabilitation Act. The district court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."<sup>71</sup> The district court went on to hold that even if a person with a contagious disease could be deemed a handicapped person, Arline was not

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64. *Id.* (applying 29 U.S.C. § 706(7)(B)(iii)).

65. *Id.* at n.75 and accompanying text.

66. 480 U.S. 273 (1987).

67. 29 U.S.C. § 794 (1994).

68. *See Arline*, 480 U.S. at 288.

69. *See id.* at 276.

70. *See id.*

71. *Id.* at 277 (citation omitted).

qualified to teach because she had a contagious disease that might be communicated to her students or fellow teachers.<sup>72</sup>

On appeal, the Court of Appeals for the Eleventh Circuit reversed the district court decision and held that a person with a contagious disease is handicapped within the meaning of section 504 of the Rehabilitation Act.<sup>73</sup> The court of appeals remanded the case for findings with respect to the questions whether there were actual risks of infection that would preclude Arline from being qualified for the teaching job, and if so, whether the school could reasonably accommodate her in a non-teaching job or other position.

Affirming the Eleventh Circuit, the United States Supreme Court (7-0) held that Arline was handicapped within the meaning of section 504 of the Rehabilitation Act.<sup>74</sup> The Court's opinion directed attention at the regulations promulgated by the United States Department of Health and Human Services (HHS) that define the terms used in the Rehabilitation Act's statutory definitions of handicapped individuals, specifically "physical impairment" and "major life activities."<sup>75</sup> The Court noted that impairment is defined as including any physiological disorder or condition, cosmetic disfigurement, or anatomical loss which affects one or more specified body systems.<sup>76</sup> The Court also took note that specified major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>77</sup>

The Court concluded that Arline "had a physical impairment," as that term is defined in the Department of Health and Human Services Regulation because she had a physiological disorder or condition that affected her respiratory system.<sup>78</sup> The fact that Arline was hospitalized in 1957 because of the same impairment was sufficient to establish that one or more of her major life activities were substantially limited by her impairment, and her previous hospitalizations also established that Arline had a record of such impairment within the definitional terms of the Rehabilitation Act.

The defendant school board conceded that a contagious disease could constitute an impairment to the extent that a person's physical or mental capacities were diminished, and further conceded that Arline's hospitalization in 1975 for tuberculosis established a record of physical impairment. However, the defendant argued that this impairment and record of impairment were irrelevant since Arline was terminated, not because of her diminished physical or mental capacity, but because of the threat of contagion that her tuberculin condition posed to others.

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72. *See id.*

73. *See Arline v. School Bd. of Nassau County*, 772 F.2d 759 (11th Cir. 1985), *aff'd*, 480 U.S. at 273.

74. *See Arline*, 480 U.S. at 273.

75. *Id.* at 281 (citing 45 C.F.R. § 84.3(j)(2)(i), (ii) (1984)).

76. *See id.* at 280 (citing § 84.3(j)(2)(i)).

77. *Id.* (citing § 84.3(j)(2)(ii)).

78. *Id.* at 282.

The Court majority rejected the School Board's arguments on the basis that the unobservable effects of a contagious or communicable disease on an individual cannot be meaningfully distinguished from the disease's physical effects on the infected person.<sup>79</sup> The Court reasoned that Arline's contagiousness and her physical impairment resulted from the same condition and that it would be unfair to allow employers to rely on a distinction between the effects of a disease on a patient and the effects of the disease on others to justify discrimination. The Court noted that prejudicial attitudes, ignorance, myths, and fears about disability, disease, and contagiousness were meant to be eliminated by the Rehabilitation Act's enforcement based on reasoned and medically sound judgments. The Court emphasized, "[T]he fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases."<sup>80</sup>

Turning to the question of whether Arline was otherwise qualified as an elementary school teacher, the Court found a need to remand the case to the district court for a determination as to whether Arline was otherwise qualified. The Court provided some guidance by instructing the district court that in making findings of fact with regard to job qualification, the district court should normally defer to the reasonable judgments of public health officials.<sup>81</sup> The Court made it clear, however, that a person who poses a significant risk of communicating on infectious disease to others in the workplace will not be found qualified for employment if reasonable accommodation would not eliminate that risk.<sup>82</sup> On remand, the district court held that Arline was an otherwise qualified person under the Rehabilitation Act and ordered that she be reinstated to her position as a school teacher.<sup>83</sup>

Even at the time that *Arline* was being argued in the Supreme Court, an effort was made to determine the significance of the opinion for persons with AIDS and HIV infection. In fact, the question of whether AIDS constitutes a handicapped under the Rehabilitation Act implicitly was raised by the United States, appearing as *amicus curiae*. The Solicitor General argued that it is possible for an individual to be a carrier of a disease, "that is, to be capable of spreading a disease without having a 'physical impairment' or suffering from any symptoms associated with the disease."<sup>84</sup> Asserting that this was an accurate description of carriers of the "AIDS virus," the Solicitor General argued that discrimination solely on the basis of contagion could never constitute discrimination on the basis of handicap. This is, of course, a central argument made in the 1986 Memorandum of the Department of Justice's Office of Legal Counsel.<sup>85</sup> Both the

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79. *See id.*

80. *Id.* at 285.

81. *See id.* at 288.

82. *See id.*

83. *See Arline v. School Bd. of Nassau County*, 692 F. Supp. 1286 (M.D. Fla. 1988).

84. *Arline*, 480 U.S. at 282 n.7 (citation omitted).

85. *See supra* notes 55-65 and accompanying text.

position of Solicitor General and the 1986 DOJ Memorandum were based on what is known to be the mistaken position that there are carriers of HIV who are not themselves infected and experiencing the effects of such infection on the compromise of their immune system and reduction in their white blood cell count. The Court, however, found it unnecessary to address the Solicitor General's argument because the disease at issue in *Arline*, tuberculosis, involved both physical impairment and contagiousness. Thus, the Court concluded, "[W]e therefore, do not reach the question whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagion, a handicapped person as defined by the [Rehabilitation] Act."<sup>86</sup>

The Legal Counsel's office of the Department of Justice was asked in 1988 to revisit the question of the applicability of section 504 of the Rehabilitation Act of 1973 to persons infected with HIV in light of the opinion of the United States Supreme. In a memorandum of September 27, 1988, an opinion was offered that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity (1) in the non-employment context, so long as the HIV infected individual is "otherwise qualified to participate in the program or activity; and (2) in the employment context so long as the HIV infected individual is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others."<sup>87</sup> This latter distinction reflects the terms of the Civil Rights Restoration Act which replaced the "otherwise qualified" standard with the formulation set out above.<sup>88</sup>

The 1986 DOJ Memorandum specifically supercedes the 1986 opinion from Charles Cooper.<sup>89</sup> Persons with HIV infection are characterized as either symptomatic HIV-infected individuals, including persons with AIDS or ARC, or asymptomatic HIV-infected individuals.<sup>90</sup> The memorandum adopts the position that available medical information established that HIV infection is a physical impairment which in any given case may substantially limit a person's major life activities; in addition, the memorandum recognized that others may regard an HIV-infected person as being so impaired.<sup>91</sup> The memorandum also responded to the issue raised by the discussion in the *Arline* opinion of whether there are carriers of the "AIDS virus" that do not have any physical impairment: "By

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86. *Arline*, 480 U.S. at 282 n.7.

87. See Memorandum from Acting Assistant Attorney General Douglas Kamiec on Application of Rehabilitation Act's Section 504 to HIV-infected Persons, Daily Law Rep. (BNA) No. 195 at D-1 (Oct. 7, 1988) [hereinafter DOJ Memorandum-II].

88. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 9, 102 Stat. 28, 31-32 (1988) (amending 29 U.S.C. § 706) (precluded attempt to remove contagious disease from the definition of handicap under the Rehabilitation Act and codified in part the holding in *Arline*).

89. See DOJ Memorandum II, *supra* note 87, at n.4.

90. See *id.* at n.2.

91. See *id.* at n.3.

virtue of the fact that the handicap here, HIV infection, given rise both to disabling physical symptoms and to contagiousness."<sup>92</sup> The memorandum concluded, "[T]he medical information available to us undermined the accuracy of the assumption or contentions referenced in *Arline* that carriers of the AIDS virus are without physical symptoms."<sup>93</sup>

The 1988 DOJ Memorandum concluded that all symptomatic HIV-infected individuals are handicapped under section 504.<sup>94</sup> This conclusion was based on the finding that in symptomatic patients or patients with AIDS, HIV infection has progressed to the point where the immune system has been sufficiently weakened so that opportunistic infection or disease, such as cancer or pneumonia, has developed. According to the DOJ view, the substantial limiting effects that the clinical symptoms have on many major life handicaps are such that every symptomatic HIV-infected person is an individual with handicaps for purposes of section 504.

Asymptomatic HIV-infection is given greater attention in the 1988 DOJ Memorandum since the author of the opinion recognized that *Arline* did not resolve the application of section 504 to asymptomatic HIV-infected individuals.<sup>95</sup> The DOJ Memorandum identifies the three areas of inquiry required to determine whether an asymptomatic HIV-infected individual is a person with a handicap. These include: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether this impairment substantially limits a major effect, i.e., whether it has a disabling effect; or (3) whether an individual with HIV infection is regarded as having an impairment which substantially limits a major life activity.<sup>96</sup>

The DOJ Memorandum places heavy reliance on the views expressed by the Public Health Service, especially by the Surgeon General of the Public Health Service, Dr. C. Everett Koop, in deciding whether HIV-infection alone is an impairment, i.e., whether the asymptomatic HIV-infected individual has an impairment. Dr. Koop reported that HIV infection is the starting point of a single disease process that progresses through a continuum of stages, rather than involving a series of discrete illness. The Surgeon General concluded that "from a purely scientific perspective, persons with HIV infection are clearly impaired."<sup>97</sup> According to Dr. Koop, asymptomatic HIV infected persons are not comparable to immune carriers of a contagious disease such as hepatitis B. Like a person in the early stages of cancer, asymptomatic HIV infected persons may appear outwardly healthy, but are in fact seriously ill."<sup>98</sup>

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92. *Id.*

93. *Id.*

94. *See id.* at (II)(A).

95. *See id.* at n.8.

96. *See id.*

97. *Id.* (citing letter of Surgeon General C. Everett Koop to Acting Assistant Attorney General Douglas Kmiec).

98. *Id.* (citing letter of Surgeon General C. Everett Koop to Acting Assistant Attorney General Douglas Kmiec).

In order to determine the meaning of the statutory term “physical impairment,” the 1988 DOJ Memorandum placed specific reliance on the regulations promulgated by the Department of Health and Human Services defining the term as:

[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine.<sup>99</sup>

In addition to the regulations, the 1988 DOJ Memorandum noted the existence of an appendix to the HHS regulations that provided an illustrative, although not exhaustive, list of diseases and conditions that are “physical impairments” for purposes of section 504: “such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer and heart disease, diabetes, mental retardation [and] emotional illness, and . . . drug addiction and alcoholism.”<sup>100</sup>

The 1988 DOJ Memorandum proceeded to apply the HHS regulations and commentary to the factual description given by the Surgeon General of the condition of the asymptomatic HIV-infected individual, concluding that this medical condition meets the HHS definition of “physical impairment” because it is a “physiological disorder or condition” which affects the “hemic and lymphatic” systems of the HIV-infected individual.<sup>101</sup>

The 1988 DOJ Memorandum moved on to the second question: whether the impairment caused by HIV-infection substantially limits any major activities in the asymptomatic individual. The author of the memorandum found some guidance in the illustrative, but not exhaustive, HHS regulations implementing section 504 which define “major life activities” to include such functions as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”<sup>102</sup> The 1988 DOJ Memorandum acknowledged that it is not so readily apparent that asymptomatic, HIV-infected persons are substantially limited in major life activities because they have no obvious disabling physical effects resulting from their HIV infection. These asymptomatic individuals appear able to work, to care for themselves, to perform manual tasks, and fully to use their senses.

The 1988 DOJ Memorandum identified procreation and intimate personal relations as two of the most significant major life activities substantially limited by HIV infection.<sup>103</sup> Although these activities are not listed in the HHS regulations, the 1988 DOJ Memorandum emphasized that the list provided by HHS is to be taken as illustrative and not as complete or exhaustive.

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99. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(1) (1987)).

100. *Id.* (quoting 45 C.F.R. § 84. App. A, pt. 344).

101. *Id.* (citation omitted).

102. *Id.* (quoting § 84.3(j)(2)(ii)).

103. *See id.* at Part II (B)(2).



The 1988 DOJ Memorandum maintained that the major life activity of procreation, the process of impregnating, conceiving, bearing and giving birth to a healthy child, is substantially limited in the case of asymptomatic HIV-infected individuals. This conclusion was based on the significant risk that HIV will be transmitted during pregnancy or at birth so that infected males and females cannot engage in the process of procreation with the assured expectation of producing a healthy child. The 1988 DOJ Memorandum concluded, "There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited when an individual is infected with the AIDS virus."<sup>104</sup>

According to the 1998 DOJ Memorandum, a second major life activity, which may or may not have the purpose of procreation, but is limited by HIV infection is intimate sexual relations. Because of the danger of infecting a sexual partner, the HIV infected individual is faced with the need to modify his or her intimate sexual relations, or to adopt a program of abstinence, in order to avoid infecting a sexual partner. The 1988 DOJ Memorandum concluded: "The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus."<sup>105</sup>

The 1988 DOJ Memorandum explicitly rejected the argument that HIV infection does not physically prevent procreation or intimate sexual relations, but that it is the ethical sense or the personal decision of the asymptomatic HIV-infected person not to engage in the activities that results in any limitations on sexual relations experienced by such an individual. The memorandum does not provide any significant analysis of this issue except to anticipate that a court could find, despite the element of personal decision involved, that HIV infection had limited these major life activities.

The 1988 DOJ Memorandum further examined the alternative basis for determining a person is a handicapped individual because the person is regarded by others as having a limitation of major life activities whether they do or not.<sup>106</sup> The memorandum cited the *Arline* opinions and the legislative history of the 1974 amendments to the Rehabilitation Act to establish the proposition that this added text meant an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning."<sup>107</sup> According to the 1988 DOJ Memorandum, "The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in *Arline*, the activity of working)."<sup>108</sup>

The 1988 DOJ Memorandum examined the "otherwise qualified"

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104. *Id.* at n.13.

105. *Id.* at n.12.

106. *See id.* at n.14 (construing 29 U.S.C. § 706(8)(B)(iii) (1994)).

107. *Id.* (citing S. REP. NO. 127, at 64 (1974)).

108. *Id.* at n.14.



requirement of section 504.<sup>109</sup> The memorandum concluded that based on existing scientific and medical knowledge, in most situations the risk of transmission of HIV is so slight that there will seldom be any justification for treating HIV infected individuals differently than others based on fear of contagion.<sup>110</sup> In those individuals with only "subclinical manifestations," the 1988 DOJ Memorandum concludes that it is unlikely that asymptomatic individuals would not be able to participate in any covered program by reason of disease-related inability to perform. As the individual's disease progresses and more significant clinical manifestations occur, individualized evaluation of HIV-infected person's ability to perform becomes more appropriate under the terms of the Rehabilitation Act. Possible transmission in surgical settings, or concern with effects of HIV-related dementia in sensitive positions such as air traffic controllers, were identified as the type of situations where justification might be established for treating HIV infected individuals differently from unimpaired individuals.<sup>111</sup>

*C. Case Law Extending Protection Under Rehabilitation Act to HIV-Infected Individuals*

Many of the federal courts that considered the application of the Rehabilitation Act of 1973 and the state courts construing state laws that were based on the federal statute in cases involving persons with HIV-infection, initially proceeded on the assumption that there was a difference in the condition of those persons with AIDS diagnosis and persons who were HIV infected but asymptomatic. Nevertheless, every court that considered the application of the Rehabilitation Act to HIV-infected persons whether asymptomatic or symptomatic found the individuals protected by the Rehabilitation Act or involving application of those state laws modeled on the federal statute.<sup>112</sup> While some of these courts directed attention to the requirements of an "impairment"

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109. *Id.* at Part II(C).

110. *See id.* at n.17.

111. *See id.* (referring to Surgeon General's Report on Acquired Immune Deficiency Syndrome (1986)).

112. *See* Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988); Doe v. Dalton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988); Doe v. Centinela Hosp., No. CV 87-2514 PAR(PX), 1988 WL 81776 (C.D. Cal. June 30, 1988); Martinez v. School Bd., 675 F. Supp. 1574 (M.D. Fla. 1987); Doe v. Belleville Pub. Sch. Dist., 672 F. Supp. 342 (S.D. Ill. 1987); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987); American Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987); Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986); Raytheon Co. v. California Fair Employment 2nd Hous. Comm'n, 261 Cal. Rptr. 197 (Cal. Ct. App. 1989); Board of Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986), *aff'd*, 523 A.2d 655 (N.J. Sup. Ct. 1987); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

that "substantially limited a major life activity,"<sup>113</sup> many courts simply presumed an HIV-infected person was a "person with handicaps."<sup>114</sup> Much of the focus of these court opinions was whether the handicapped person was "otherwise qualified," and in that context, whether the HIV-infected person's communicable disease was a threat to others.<sup>115</sup> Every reported decision construing the protection of the Rehabilitation Act of 1973 up to the passage of the Americans with Disabilities Act in 1990 found HIV-infection, whether it resulted in an AIDS diagnosis or was asymptomatic, to meet the criteria for establishing that HIV-infected individuals were "persons with handicaps." The following discussion of judicial opinions will examine typical cases that take the position that HIV-infection, whether it resulted in AIDS or whether the infected individual remained asymptomatic, meets the requirements for establishing a "person with handicaps."

*D. Individual with AIDS Diagnosis Is Handicapped: Chalk v. United States District Court for the Central District of California*

The first federal court of appeals decision to address the treatment of AIDS as a handicap under the Rehabilitation Act was *Chalk v. United States District Court* decided by the Ninth Circuit in 1988.<sup>116</sup> The court found that a teacher diagnosed with AIDS was handicapped and qualified for employment within the meaning and coverage of the Rehabilitation Act, as construed by the United States Supreme Court in *Arline*.<sup>117</sup> The court of appeals did not find it necessary to determine the existence of an "impairment" that "substantially limits one or more of such person's major life activities"; assuming these elements were satisfied, the court focused on the "direct threat" issue. The court was persuaded that medical and scientific evidence established that the virus causing AIDS could not be transmitted through normal classroom contact.

The petitioner, Chalk, a teacher of hearing-impaired student, was hospitalized with pneumocystis carinii pneumonia and diagnosed as having AIDS. After eight weeks, the teacher was released to return to work by his physician. However, the county department of education, Chalk's employer, placed him on administrative leave pending the medical opinion of the county health director that Chalk was fit to return to work. The county health director subsequently informed the employer that the teacher posed no risk of infecting his students or others with the virus causing AIDS.<sup>118</sup> After the close of the school year, the employer offered the teacher an administrative position, at the same rate of pay and benefits, with the option of working at the education department's offices or at

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113. See, e.g., *Centinela Hosp.*, 1988 WL 81776.

114. See, e.g., *Chalk*, 840 F.2d at 701.

115. *Id.*

116. See *id.*

117. See *id.* at 871 (applying *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987)).

118. See *id.* at 703.

his home. The employer also advised the teacher that his insistence on returning to the classroom would be met by an effort to obtain court-ordered declaratory relief. When Chalk insisted on returning to teaching, the employer filed a state court action. Chalk responded by filing a federal court suit seeking a preliminary and permanent injunction barring the employer from excluding him from the classroom. Instead of pursuing its state court suit, the employer counterclaimed in a federal court action.<sup>119</sup>

The federal district court denied the teacher's motion for a preliminary injunction. The court then addressed each of the four factors set out in *Arline* for determining whether a person was "otherwise qualified" in terms of the risk of transmission of a contagious disease:

- (1) the nature of the risk (how the disease is transmitted),
- (2) the duration of the risk (how long is the carrier infectious),
- (3) the severity of the risk (what is the potential harm to third parties),
- (4) the probabilities that the disease will be transmitted and will cause varying degrees of harm.<sup>120</sup>

The court found, based on current medical and scientific knowledge, that in the case of a person infected with the virus that causes AIDS:

- (1) the duration of the risk of infection was long,
- (2) the severity of the risk was catastrophic,
- (3) transmission of the disease appeared unlikely to occur, and
- (4) the probability that the disease would cause harm to others in the workplace setting was minimal.<sup>121</sup>

However, the district court remained uncertain about the strength of the medical understanding of AIDS, about scientific knowledge of HIV transmission because of the relatively limited time for actual observation of the AIDS epidemic, and about the risk that the "almost inevitable mutation of the virus" could lead to new transmission routes.<sup>122</sup> Due to this uncertainty, the court denied the teacher's motion. Further, the district court concluded that the teacher's injury was outweighed by the fear likely to be produced by his presence in the classroom. The employer reassigned the teacher to an administrative position coordinating grant applications and materials for the hearing impaired program.

The Ninth Circuit reversed the District Court focusing primarily on the "otherwise qualified" element of the Rehabilitation Act assuming that the elements needed to establish that the petitioner was "an individual with handicaps" were met. Because the posture of the case was a denial of a motion for a preliminary and permanent injunction, the court of appeals framed the issue as whether the teacher could demonstrate the required probability of success on

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119. See *id.*

120. *Id.* at 706-07 (citing *Arline*, 480 U.S. at 286 (quoting Brief of the American Medical Association as amicus curiae in *Arline* at 28)).

121. *Id.* at 706.

122. *Id.* at 707.

the merits of a permanent injunction. The court of appeals began with a review of the *Arline* holding by framing the issue in the following terms: "[T]he question which is of central importance to this case: under what circumstances may a person handicapped with a contagious disease be 'otherwise qualified' within the meaning of Section 504?"<sup>123</sup>

The court of appeals recognized the four factors set out in the *Arline* opinion to be the determinative considerations that need to be examined in handicap cases involving contagious diseases.<sup>124</sup> The court noted that the petitioner had submitted evidence to the district court of over one hundred medical journal articles and the statements of five AIDS experts, submissions that revealed "[a]n overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS."<sup>125</sup> The court observed that all published studies "have consistently found no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients."<sup>126</sup> In support of its findings, the court cited:

- (1) the Surgeon General's report that found no known risk of non-sexual infection by everyday contact or in the school settings,<sup>127</sup>
- (2) reports of the Centers for Diseases Control,
- (3) a report of the Institute of Medicine of the National Academy of Sciences, and
- (4) an amicus brief filed by the American Medical Association in support of the petitioner's position on appeal.<sup>128</sup>

The court of appeals concluded that the district court had failed to properly apply the *Arline* four part analysis and had improperly placed the burden of proof on the teacher. The court interpreted *Arline* as permitting discriminatory exclusion only where there is a significant risk of communicating an infectious disease to others. Further, the court of appeals found that the district court ignored the admonition in *Arline* to defer to the reasonable medical judgment of public health officials. The Ninth Circuit held that, rather, the lower court improperly relied on speculation and rejected the overwhelming consensus of medical opinion. Finding that *Chalk* had demonstrated a strong probability of success on the merits, the Ninth Circuit held that it was error to require the teacher to disprove all theoretical possibilities of harm.<sup>129</sup>

The Ninth Circuit also ruled that the teacher's injury outweighed any harm to the employer. The court noted that there was no evidence of significant risk to children or others at the school resulting from the teacher's presence and that

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123. *Id.* at 705.

124. *See id.* at 706.

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.* (quoting United States Public Health Service's Surgeon General's Report on Acquired Immune Deficiency Syndrome (1986)).

129. *See id.* at 707.

a decision based on fear would frustrate the goals of the Rehabilitation Act. The court did recognize that the district court would have to deal with the apprehension of the school community and the likely progress of the teacher's disease. As the teacher would be susceptible to opportunistic infections which themselves would be communicable, the Ninth Circuit instructed the district court to determine reasonable procedures, including periodic reports from the teacher's doctors, to assure that no significant risk of harm would arise from the teacher's classroom presence.<sup>130</sup>

The court in *Chalk* apparently assumed that the *Arline* opinion established that individuals with an AIDS diagnosis are handicapped and that it is unnecessary in subsequent litigation for a court to make a case-by-case analysis to determine that individuals with AIDS are "persons with handicaps." The analysis undertaken by the court of appeals was limited to a determination of whether the presumed handicapped individual was "otherwise qualified." In making this determination, the court applied the factors outlined in *Arline* and relied on established medical and scientific evidence to determine whether there was any danger of transmission of the particular communicable virus that infects the person with AIDS. The Ninth Circuit accepted the reported consensus in medical knowledge about AIDS as the benchmark by which special treatment of persons with AIDS must be evaluated.

*E. Asymptomatic HIV-Infection Individual Perceived as Handicapped:  
Doe v. Centinela Hospital*

In *Doe v. Centinela Hospital*,<sup>131</sup> decided in 1988, a California federal district court found an asymptomatic HIV-infected individual to be properly excluded from a federally funded hospital's residential drug and alcohol program because of fear of contagion, and to be handicapped within the terms of section 504 of the Rehabilitation Act of 1973.

The plaintiff charged the hospital with a violation of section 504 on the ground that he was a "seropositive" individual, thus an "individual with handicaps" excluded from a covered program.<sup>132</sup> The plaintiff had been discharged from the hospital's rehabilitation program after he tested positive on an HIV-antibody test. The court found that a positive test result indicated that a person was infected with HIV and capable of transmitting the virus to others.<sup>133</sup>

The court acknowledged the requirements of the HHS regulations for determining whether a person is handicapped; namely if he "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, or (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."<sup>134</sup>

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130. See *id.* at 712.

131. No. CV87-2514 PAR (PX), 1988 WL 81776 (C.D. Cal. June 30, 1988).

132. *Id.* at \*1.

133. See *id.* at \*6 (citing 29 U.S.C. § 706(8)(b)).

134. *Id.* at \*5 (citation omitted).

In applying this criteria, some confusion arose as a result of the plaintiff's effort to identify what "major life activity" was at issue. The plaintiff first argued that limiting his "access to health care" constituted a limitation of a major life activity that is limited by his being regarded as handicapped; alternatively he argued that he was regarded as handicapped and because "his reproductive system" was indisputably impaired, he meets the elements set out in the HHS regulations.<sup>135</sup>

The court viewed the case as one involving the question of whether the plaintiff is "regarded as having such an impairment."<sup>136</sup> Specifically, the court avoided the issue of whether all asymptomatic HIV-infected persons are handicapped. According to the court, "On the record adduced in this case, it is necessary only to address the question whether [the hospital] regarded this plaintiff as having a disabling handicap; it is not necessary to reach the broader question whether asymptomatic HIV carriers are in all cases protected by § 504."<sup>137</sup>

The court was able to side-step the question of whether the two major life activities identified by the plaintiff met the statutory criteria and whether, in fact, the plaintiff's infection limited the plaintiff's ability to engage in the activities. Instead, the court found that the discrimination by the hospital based on the plaintiff's infection did substantially limit his ability to obtain treatment for his addiction.<sup>138</sup> It is significant that the court did not identify a life activity that was directly impacted by HIV infection, but instead the court identified a life activity limited as a result of discrimination occasioned by the fact the patient was infected with HIV.<sup>139</sup> The approach of the court is clearly revealed in its language: "There is no dispute that [the hospital] perceived plaintiff to have precisely the condition [physical impairment] that he actually has and treated him on that account as limited in his ability to learn how to deal with a dependency [a major life activity] in the [covered] program."<sup>140</sup> As if to emphasize this view of the elements to be proven, the court asserted that "'major life activities' include learning. Therefore, given the fact that impairment is uncontroverted, and plaintiff's condition was treated by [the hospital] as limiting a major life activity, the only question is whether that limitation was substantial."<sup>141</sup>

The court concluded that the hospital's concern with the potential for transmission of HIV totally precluded the patient from participating in the drug treatment program and, therefore, the exclusion substantially limited a major life activity of the patient despite the fact that there were alternative out-patient programs available.<sup>142</sup> The court decided that the only issue to be resolved was

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135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.* at \*7.

139. *See id.*

140. *Id.* at \*6.

141. *Id.*

142. *See id.* at \*7.



whether the patient was "otherwise qualified" and remanded the case for trial on that issue.<sup>143</sup>

The opinion in *Doe v. Centinela* is significant both for what it did and did not decide. The court avoided determining whether all asymptomatic HIV-infected persons were "individuals with handicaps." However, the opinion broadened the basis for establishment of whether a person with an impairment is handicapped by allowing a showing that discrimination that followed from a perception that the person is handicapped resulted in interference with a major life activity, rather than requiring that the impairment directly result in a substantial limitation of a major life activity.

*F. Asymptomatic HIV-Infected Individual Is Per Se Handicapped:*

*Thomas v. Atascadero Unified School District*

The view that asymptomatic HIV-infected persons are per se handicapped under the Rehabilitation Act of 1973 was adopted by a federal district court in California in 1986 in *Thomas v. Atascadero Unified School District*.<sup>144</sup> The court entered a permanent injunction in favor of a HIV-infected kindergarten student who had been expelled from school after biting another child. The court found the HIV-infected child handicapped under the Rehabilitation Act and ordered the defendant school district to allow the child to attend regular kindergarten classes.<sup>145</sup>

The court, relying on the Centers for Diseases Control's expertise, determined that infection with HIV involved a range of symptoms ranging from early acute, though transient, manifestations of infection, asymptomatic infection, persistent swollen lymph-nodes and the presence of opportunistic disease and/or rare type of cancer.

The court concluded that all phases of HIV infection constitute an impairment and that infection inevitably substantially limits some major life functions of every infected person.<sup>146</sup> The court reasoned as follows:

Individuals in all four of the CDC classifications [of HIV disease] suffer from impairments to their physical symptoms. Persons infected with the AIDS virus suffer significant impairments of their major life activities. People infected with the AIDS virus may have difficulty caring for themselves, performing manual tasks . . . learning and walking, among other life functions. Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making reproduction and childbirth dangerous to themselves and others.<sup>147</sup>

The court concluded that asymptomatic HIV-positive individuals are

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143. *Id.* at \*7-11.

144. 662 F. Supp. 376 (C.D. Cal. 1986).

145. *See id.* at 381.

146. *See id.* at 379.

147. *Id.*



handicapped under the Rehabilitation Act.<sup>148</sup>

Since the plaintiff was a kindergarten child, the court obviously found no need to inquire into whether the plaintiff intended to have children, but for having contracted HIV-infection. The court basically eschewed a case-by-case analysis with the effect that asymptomatic HIV-infected persons were viewed as per se "persons with handicaps."<sup>149</sup>

#### V. AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990 ("ADA")<sup>150</sup> is an omnibus federal anti-discrimination law prohibiting discrimination against persons with disabilities in employment,<sup>151</sup> government programs and services,<sup>152</sup> public accommodations and services,<sup>153</sup> and telecommunications.<sup>154</sup> The ADA replaces the word "handicap" found in the Rehabilitation Act of 1973<sup>155</sup> with the term "disability" in order to avoid what some considered unfavorable connotations of the former usage.<sup>156</sup> In order to come under the protection of the ADA, an individual must satisfy the definition of disability developed in the statute and as promulgated in regulations by the Congressionally delegated agencies. For example, under Title I of the ADA the designated agency is the Equal Employment Opportunity Commission ("EEOC").<sup>157</sup> The EEOC issued regulations along with interpretative guidelines on June 26, 1991.<sup>158</sup> The legislative history of the ADA reveals that the relevant case law interpreting the Rehabilitation Act of 1973 should generally be applied when interpreting not only the term disability, but also the other language in the ADA.<sup>159</sup> The ADA specifically provides that it shall not invalidate or limit the remedies and rights available under any other federal or state laws that provides greater or equal protection for the rights of individuals with disabilities.<sup>160</sup>

The ADA contains four substantive parts or titles with a fifth title covering enforcement provisions and exemptions. Title I regulates employment relations and prohibits employers from discriminating against any qualified individual

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148. *See id.* at 381.

149. *See id.* at 381-82.

150. 42 U.S.C. §§ 12,101-12,213 (1994).

151. *See* 42 U.S.C. §§ 12,111-12,117.

152. *See id.* §§ 12,131-12,134.

153. *See id.* §§ 12,141-12,165.

154. *See id.* §§ 12,181-12,189.

155. 29 U.S.C. § 706(8)(b).

156. *See* 42 U.S.C. § 12,101(b).

157. *See id.* § 12,117.

158. *See* 29 C.F.R. § 1630.1 (1987); 56 Fed. Reg. 35,726 (1991).

159. *See* H.R. REP. NO. 485, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332-66; H.R. REP. NO. 485, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450-54; S. REP. NO. 116, at 21 (1989).

160. *See* 42 U.S.C. § 12,201(b).

with a disability with regard to hiring, promoting, firing or any term or condition, or privilege of employment.<sup>161</sup> Title II of the ADA prohibits discrimination in public services, and also imposes an accommodation requirement on state and local government providers of services.<sup>162</sup> Title III prohibits discrimination in places of public accommodation and commercial facilities and requires the design of new facilities to provide access for the disabled.<sup>163</sup> Title IV relates to telecommunication and common carriers,<sup>164</sup> imposing, for example, requirements for telephone communications for speech and hearing impaired individuals.<sup>165</sup>

The ADA definition of "a person with a disability"<sup>166</sup> tracks the definition of "a person with handicaps" under the Rehabilitation Act of 1973.<sup>167</sup> An individual has a disability under the ADA if any one of three circumstances is present: (1) has a physical or mental impairment that subsequently limits one or more of the major life activities; or (2) is regarded as having such an impairment, or (3) has a record of such impairment.<sup>168</sup> In the context of the ADA, the term "disabled" does not include individuals solely because the individual is a transvestite, homosexual or bisexual; additional conditions not included are transsexualism, pedophilia, exhibitionism, voyeurism, gender disorder absent physical impairment, compulsive gambling, kleptomania.<sup>169</sup> Where use of controlled substances is the basis of any adverse treatment, the individual is not considered qualified for protection under the ADA.<sup>170</sup>

The ADA requires that the EEOC issue regulations to implement the provisions dealing with employment discrimination under Title I.<sup>171</sup> The regulations provide clarification of the definition of disability by providing guidance for applying the specific terms of the statute including: (1) physical or mental impairment;<sup>172</sup> (2) major life activities;<sup>173</sup> (3) substantially limits;<sup>174</sup> (4) has a record of such impairment;<sup>175</sup> and (5) is regarded as having such an impairment.<sup>176</sup>

The regulations issued by the EEOC in 1991 provide guidance for applying the first prong of the definition of "a person with a disability" by stating that the

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161. *See id.* §§ 12,111-12,117.

162. *See id.* §§ 12,131-12,165.

163. *See id.* §§ 12,181-12,189.

164. *See id.* §§ 225, 711.

165. *See* 47 U.S.C. § 225.

166. 42 U.S.C. § 12,102(2).

167. 29 U.S.C. § 706(8)(B), (C).

168. *See* 42 U.S.C. § 12,102(2).

169. *See id.* §§ 12,114, 12,208, 12,211.

170. *See id.* §§ 12,114, 12,210.

171. *See id.* § 12,116.

172. *See* 29 C.F.R. § 1630.2(h) (1999).

173. *See id.* § 1630.2(i).

174. *See id.* § 1630.2(j).

175. *See id.* § 1630.2(k).

176. *See id.* § 1630.2(l).

term "physical impairment" included: (1) any physical disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or (2) any mental or psychological disorder, such as mental retardation, organic-brain syndrome, emotional or mental illness, and specific hearing disabilities.<sup>177</sup> The EEOC regulations further provided that whether a person is impaired is to be determined without mitigating measures such as medicines, or assistive or prosthetic devices.<sup>178</sup> The example given is that of an epileptic who is to be regarded as having an impairment even if the symptoms of epilepsy can be controlled by drugs.<sup>179</sup> Similarly, a person with a hearing or vision loss is to be regarded as impaired even if the condition can be corrected with a hearing aid or glasses.<sup>180</sup>

According to the EEOC regulations, major life activities include: "Caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, or working."<sup>181</sup> The regulations specifically indicate that the provided list is not to be regarded as exhaustive noting that other major life activities "include, but are not limited to, sitting, standing, lifting and reaching."<sup>182</sup> The EEOC Interpretative Guidelines include within the terms of major life activities "those basic activities that the average person in the general population can perform with little or no difficulty."<sup>183</sup>

The EEOC set out factors to be considered in determining whether an individual is substantially limited in a major activity including: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact, resulting from the impairment."<sup>184</sup> The term "substantially limits" is given the meaning: "(i) unable to perform a major life activity that the average person of the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which . . . the average person in the general population can perform that same major life activity."<sup>185</sup> The EEOC guidelines indicate that for a disability to exist an impairment must substantially limit one or more of an individual's major life

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177. See *id.* § 1630.2(h).

178. See 29 C.F.R. app. § 1630.2(h). But see the recent Supreme Court cases holding that mitigating measures are taken into account in determining disability, *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

179. See *id.*

180. See *id.*

181. *Id.* § 1630.2(i).

182. *Id.*

183. 29 C.F.R. § 1630.2(i).

184. *Id.* § 1630.2(j)(2).

185. *Id.* § 1630.2(j)(1).

activities.<sup>186</sup>

Under the second prong of the ADA's definition of disabled, an individual with a record of such impairment "is someone who (1) had a physiological or mental disorder but no longer has that impairment" (e.g., an individual who in the past was misclassified as having a learning disorder.)<sup>187</sup> The EEOC interpretation of this prong of the disability definition requires that the record of impairment must show that it would substantially limit one or more of the individual's major life activities.<sup>188</sup> Further, the individual's record of impairment must be of a condition that would be covered under the ADA if it were a current condition.<sup>189</sup> The EEOC's interpretation of the ADA takes the view that the mere fact an individual has a record of being a "disabled veteran," or is on "disability retirement," or is classified as disabled for other purposes does not mean that the individual necessarily satisfies the ADA definition of disability.<sup>190</sup>

Under the third prong of the ADA's definition of disability, an individual who "is regarded as having such an impairment"<sup>191</sup> can fit into one of three different categories according to the EEOC regulations.<sup>192</sup> The first category includes individuals with a physical or mental impairment that does not substantially limit a major life activity, but whose impairment is treated as though it does.<sup>193</sup> The EEOC offers the example of an individual with controlled high blood pressure that is not, in fact, substantially limiting, but who is reassigned to less strenuous work because of the employer's unsubstantiated fears.<sup>194</sup> The second category includes individuals with a physical or mental impairment that substantially limits a major life activity only as a result of the prejudice of others toward the impairment.<sup>195</sup> An example of one such impairment is physical disfigurement.<sup>196</sup> Finally, individuals may fit into the third category which includes persons who do not have a physical or mental impairment but who are treated as though they do.<sup>197</sup> This category includes the male homosexual who is assumed to be HIV infected merely by virtue of his sexual orientation.<sup>198</sup>

Neither AIDS nor the HIV infection is directly identified within the statutory language of the ADA. Of course, this is to be expected because the ADA does

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186. See *id.* § 1630.2(i).

187. 29 C.F.R. app. § 1630.2(k); 56 Fed. Reg. 35,742.

188. See 29 C.F.R. app. § 1630.2(i)-(j); 56 Fed. Reg. 35,741.

189. See 29 C.F.R. app. § 1630.2(i)-(j); 56 Fed. Reg. 35,741.

190. 29 C.F.R. app. § 1630.2(k); 56 Fed. Reg. 35,742.

191. 42 U.S.C. § 12,202(2)(c) (1994).

192. See 29 C.F.R. app. § 1630.2(1); 56 Fed. Reg. 35,742.

193. See 29 C.F.R. app. § 1630.2(i) (construing 42 U.S.C. § 12,102(2)(A)-(C)).

194. See *id.*

195. See *id.*

196. See *id.* (construing 42 U.S.C. § 12,102(2)(b)).

197. See *id.* (construing 42 U.S.C. § 12,102(2)(6)).

198. See *id.*

not make mention of any specific disease; but instead, defines the concept of disability with reference to impairment and substantial limitation on major life functions. However, the legislative history is clear that it was the intention of members of the House and Senate that these medical conditions be treated as disabilities.

The first legislation introduced to provide protection from discrimination of individuals having AIDS or HIV infection was the AIDS Federal Policy Act of 1987<sup>199</sup> that would have amended the Public Health Services Act. This legislation would have provided non-discrimination protection in employment, housing, and public services to those persons who were infected, or who were regarded as infected, with the causal agent for Acquired Immune Deficiency Syndrome.<sup>200</sup> This legislation made no distinction between symptomatic and asymptomatic infection. Both the Senate and House's versions of their legislation addressed the issue of "otherwise qualified" by providing that an individual would not otherwise be qualified if under established medical criteria, under the circumstances involved, an infected individual would expose other individuals to a significant possibility of being infected.<sup>201</sup> Hearings were held in 1988 on this legislation in both the House<sup>202</sup> and Senate,<sup>203</sup> but no further action was taken.

Legislation was introduced in 1988 in the form of an initial Americans with Disabilities Act, abandoning the approach of an HIV-specific statute and introducing a more generalized approach to antidiscrimination protection for persons with disabilities without identifying specifically individual diseases or disorders covered such as AIDS or HIV infection.<sup>204</sup> Joint hearings were held, but the legislation did not proceed for further action.<sup>205</sup>

In 1989, when the 101st Congress convened, the Americans with Disabilities

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199. S. 1575, H.R. 3071, 100th Cong. 1st Sess. (1987), 133 CONG. REC. 21,903 (1987).

200. See S. 1575, H.R. 3071 § 2341.

201. S. 1575, H.R. 3071 § 2341(b)(1).

202. See *Bills and Resolution to Improve AIDS Counseling and Education, and to Encourage Better Testing and Reporting to Help Protect the General Public Against AIDS Infection: Hearings on H.R. 338, H.R. 339, H.R. 344, H.R. 345, H.R. 2272, H.R. 2273, H.R. 3071, and H.R. Con. Res. 8 Before Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1988).

203. See *To Amend the Public Health Services Act to Establish a Grant Program to Provide for Counseling and Testing Services Related to Acquired Immune Deficiency Syndrome and to Establish Certain prohibitions for the Purpose of Protecting Individuals with Acquired Immune Deficiency Syndrome or Related Conditions: Hearings on S. 1575 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (1988).

204. See S. 2345, H.R. 4498, 100th Cong., 2nd Sess. (1988).

205. See *Joint Hearing of the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1988).

Act was introduced.<sup>206</sup> The Senate version of the ADA was referred to the Committee on Labor and Human Resources whose report clearly includes the conclusion that HIV infection, both symptomatic and asymptomatic, is to be treated as a disability under the ADA.<sup>207</sup> The House version of the ADA was referred to four committees, two of which (the Committee on Labor and Education<sup>208</sup> and the Committee on the Judiciary<sup>209</sup>) specifically concluded that HIV infection, whether symptomatic or asymptomatic, qualified as a disability under the ADA. While all of the Congressional legislative reports on the ADA that considered the question of whether HIV infection is a disability under the ADA reached the same conclusion that it is, however, none of the reports actually proceeded through a step-by-step analysis under the actual terms of the statute to show how AIDS and HIV-infection met the statutory criteria for disability. Instead, these reports simply assume that the impairment caused by HIV is a significant physical impairment and that persons with HIV infection are assumed to have a disability. Nevertheless, both the House and Senate reports make it clear that in enacting the ADA, both houses of Congress concurred in the view that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and that Nation's efforts to control the epidemic."<sup>210</sup> In response to this assessment, the reports of the Senate and the House make it equally clear that it was the intent of the sponsors of the ADA that the AIDS and HIV-infection be recognized as disabilities under the terms of the ADA.<sup>211</sup> For example, the House Report specifically endorsed the view that "a person infected with human immunodeficiency virus is covered under the first prong of the definition of the term disability because of a substantial limitation to procreation and intimate sexual relations."<sup>212</sup>

The various Congressional committees were much less focused on whether AIDS and HIV-infection constitute a disability than they were with whether HIV, as an infectious disease, should be treated differently than other disabilities. One of the most hotly debated issues concerned coverage of HIV-infected persons employed in food handling jobs. A proposed amendment to section 103 of the House Bill by Representative Chapman would have permitted an employer to refuse to assign, or to reassign, an employee with an infectious or communicable

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206. See S. Res. 933, 101st Cong., 1st Sess. (1989); H.R. Res. 2273, 101st Cong., 1st Sess. (1989).

207. See Senate Comm. on Labor and Human Resources, Americans with Disabilities Act of 1989, S. REP. NO. 116, at 8 (1989).

208. See H.R. REP. NO. 101-485, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

209. See H.R. REP. NO. 101-485, at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

210. H.R. REP. NO. 101-485, at 31 (1990); S. REP. NO. 101-116, at 8 (citing statement of the Chairman of the President's Commission on the Human Immunodeficiency Virus Epidemic, Admiral James Watson).

211. See S. REP. NO. 101-116, at 22 (1990), H.R. REP. NO. 101-485, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

212. H.R. REP. NO. 101-485, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 305, 333.



disease to a job involving food handling, provided the employer provided the worker alternative employment.<sup>213</sup> Congressman Chapman conceded that the Centers for Disease Control had reported that there was no evidence of any case of HIV being transmitted in the process of handling food, but the Congressman maintained that the fact there were reported cases of HIV infection when the cause of infection was unknown provided sufficient justification for the right to discriminate against HIV-infected food handlers.<sup>214</sup> In order to reach a compromise between the Senate version of the ADA and the House version with the Chapman amendment, an amendment by Senator Hatch was adopted that required the Secretary of Health and Human Services, not later than six months after passage of the ADA, to determine if there were any infections or communicable diseases that might be transmitted through food handling.<sup>215</sup> Such a list, if provided, would serve as a basis for an exception to the prohibition of employment discrimination against disabled persons.<sup>216</sup> The Secretary of Health and Human Services and the United States Public Health Service were already on record with the view that HIV is not transmitted through food preparation services, and no exception was made for food handlers with AIDS or HIV infection.<sup>217</sup>

The EEOC is responsible for enforcing the employment non-discriminations disability provisions of Title I of the ADA.<sup>218</sup> The Department of Justice (DOJ) is responsible for promulgating regulations and guidelines for enforcement of nondiscrimination against the disabled in public services under provisions of Title II of the ADA,<sup>219</sup> and in public accommodations under provisions of Title III of the ADA.<sup>220</sup> The DOJ regulations follow those of the EEOC in adopting the definition of the term "physical or mental impairment" in the regulations implementing section 504 of the Rehabilitation Act of 1973.<sup>221</sup> However, the DOJ regulations go further by adopting an additional support of the definition of "physical or mental impairment" that lists specific conditions and diseases. The DOJ regulations provide:

The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as

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213. See 136 CONG. REC. 10,911 (1990).

214. See *id.* at 10,911-12.

215. See 136 CONG. REC. S9555-6 (daily ed. July 11, 1990).

216. See *id.*

217. See Letter to Louis W. Sullivan, Secretary of Health and Human Services, 136 CONG. REC. S9545 (daily ed. July 11, 1990); CDC, *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus in the Workplace*, 34 MMWR 681, 693-94 (1985), in 136 CONG. REC. S9546 (daily ed. July 11, 1990).

218. See 42 U.S.C. § 12,116 (1994).

219. See *id.* § 12,134(a).

220. See *id.* § 12,186(b).

221. 34 C.F.R. § 104 (1999).



orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.<sup>222</sup>

The DOJ regulations clearly state that HIV infection constitutes an impairment: "HIV disease (whether symptomatic or asymptomatic constitutes a physical impairment."<sup>223</sup>

## VI. PRE-BRAGDON V. ABBOTT CASE LAW FINDING PERSONS WITH AIDS AND HIV-INFECTION PROTECTED UNDER ADA

### A. AIDS Diagnosis and HIV-Infection Treated as a Presumed Disability

Many of the federal courts considering discrimination claims based on AIDS or HIV-infection brought under the ADA have not undertaken an extensive analysis to determine whether either, or both, conditions qualify as disabilities under the statute. In some cases, the court has merely adopted the proposition that these conditions constitute a disability without further analysis. For example, in *Howe v. Hull*,<sup>224</sup> a patient's estate sued a hospital and admitting physician for refusal to admit a patient with HIV infection in a federal district court in Ohio. Although hospital physicians differed on whether the patient had progressed to full-blown AIDS or was merely HIV-positive, the federal district court found no need to reach a conclusion on this matter. Without further analysis, the court concluded: "A disability is defined [in the ADA] as 'physical or mental impairment that substantially limits the person in one or more major life activities.' AIDS and HIV infection are both disabilities within the meaning of the ADA."<sup>225</sup>

Some courts have concluded that AIDS and HIV infection constitute disabilities by reference to other courts' opinions construing the Rehabilitation Act of 1973.<sup>226</sup> These courts have simply cited regulations issued by the relevant agency designated by the ADA which provide guidance for applying the statutory terms such as "disability."<sup>227</sup>

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222. 28 C.F.R. § 36.104.

223. *Id.*

224. 873 F. Supp. 72 (N.D. Ohio 1994).

225. *Id.* at 78 (citing 42 U.S.C. § 12,102(2)(A); T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993); 28 C.F.R. § 36,104(i)(b)(ii)).

226. See, e.g., Robinson v. Henry Ford Health Sys., 892 F. Supp. 176, 180 (E.D. Mich. 1994).

227. D.B. v. Bloom, D.D.S., 896 F. Supp. 166, 170 n.4 (D.N.J. 1995).

*B. AIDS Diagnosis and HIV Infection Treated as a Per Se Disability*

In *Anderson v. Gus Maker Boston Store*,<sup>228</sup> a federal district court in Texas found AIDS and asymptomatic HIV-infection to be per se disabilities under the ADA. The court began its analysis by citing, as the standard for determination of the existence of a disability, the three-pronged definition of disability in the ADA.<sup>229</sup> The court next noted that the ADA defines disability in substantially the same terms that the Rehabilitation Act of 1973 defines handicaps.<sup>230</sup> Moreover, the ADA was enacted, according to the court, with the expectation that the Rehabilitation Act, and the case law construing it, would be used in interpreting the ADA.<sup>231</sup>

The court in *Anderson* recognized that a disability under the ADA necessarily involves an impairment that has the impact of substantially limiting one or more major activities of the individual. But significantly, the court found that the EEOC regulations promulgated pursuant to the ADA are to be given significant deference when determining the meaning of the ADA.<sup>232</sup> The court observed that although the list of major life activities in the EEOC regulations is not exhaustive, the list does include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."<sup>233</sup> Without citation the court concluded that "impairments on the procreative process also substantially limit a major life activity."<sup>234</sup>

The *Anderson* court then recognized a second basis of authority for its conclusion that AIDS and asymptomatic-HIV infection are per se disabilities under the ADA. The court was very direct in its view that a case-by-case analysis is not required because a body of case law has determined that both AIDS and HIV infection constitute disabilities due to the substantial limitations these conditions place on a person with AIDS or HIV infection in their ability to procreate or engage in sexual relationships.<sup>235</sup> The *Anderson* court declared: "Conditions such as AIDS, HIV, blindness and deafness, inter alia, have been determined by the courts to be per se disabilities. In other words, it has been established both that these conditions impact a major life activity and that this impact is substantially impairing of a given activity."<sup>236</sup> The courts reading of both the EEOC regulations and the case law provides its authority for the

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228. 924 F. Supp. 763 (E.D. Tex. 1996).

229. See *id.* at 773 (citing 42 U.S.C. § 12,102(2)).

230. See *id.* (citing *Dutcher v. Ingalls Shipbuilders*, 53 F.3d 723, 725 n.4 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993)).

231. See *id.* (citing *Collings v. Longview Fibre Co.*, 63 F.2d 828 (9th Cir. 1995); *Bolton v. Scrivner, Inc.* 36 F.3d 939 (10th Cir. 1994); 29 C.F.R. § 1630, app. Part 1630—Interpretation Guidelines to Title I of the ADA, § 1630.2(g) (1995)).

232. See *id.* at 773-74 n.19.

233. *Id.* at 773 (citing *Dutcher*, 53 F.3d at 726).

234. *Id.* at 774 (citing 29 C.F.R. § 1630.2(i)).

235. See *id.*

236. *Id.* at 774-75 (citations omitted).

conclusion that AIDS and HIV infection are per se disabilities.

The *Anderson* court, however, provided an alternative basis for finding disabilities when applying the three-pronged definition of disability provided in the ADA.<sup>237</sup> The court goes on to conclude that when a condition has not been recognized as a per se disability, the court should treat the question of whether a given condition is a disability as a mixed question of law and fact.<sup>238</sup> The court went on to conclude that if HIV is not a per se disability (as the court believes it to be), then the court finds that Anderson's HIV-status in this case was a disability as a matter of law.<sup>239</sup> To support its conclusion, the court cited the relevant EEOC regulations and noted that restrictions on procreation and travel are experienced by persons with HIV-infection.<sup>240</sup> The court notes in a footnote: "Beyond the obvious impairment on the ability to procreate, even an asymptomatic HIV-positive individual cannot travel freely. Such an individual must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations."<sup>241</sup>

*C. AIDS Diagnosis and HIV-Infection Treated as a Disability  
Because of Physical Impairment*

*Doe v. Kohn, Nast & Graph, P.C.*,<sup>242</sup> decided by a federal district court in Pennsylvania, involved an HIV-infected attorney claiming that his discharge by a law firm violated the ADA. A significant issue in the case was whether HIV-infection constituted a disability within the meaning of the ADA. The court characterized the law firm's defense in these terms: "The thrust of the defense argument is that even though HIV-positive status, most assuredly, is not a happy medical condition with which to be diagnosed, it is not in fact disabling."<sup>243</sup> Basically, the defense maintained that HIV infection was not an impairment and that the HIV infection did not interfere with any major life function of the plaintiff; most importantly, it did not prevent him from engaging in legal work.<sup>244</sup>

The federal district court began its analysis by citing the three-pronged definition of disability in the ADA.<sup>245</sup> However, the court quickly noted that the plain language of the statute does not provide any significant guidance for determining whether HIV-infection is within the meaning of disability.<sup>246</sup> Moreover, the trial court judge eschewed any notion that the everyday understanding of disability was controlling. The court noted

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237. *See id.*

238. *See id.* at 775 (citing 42 U.S.C. § 12,102(2) (1994)).

239. *See id.* at 776.

240. *See id.* at 777.

241. *Id.* at 777 n.37.

242. 862 F. Supp. 1310 (E.D. Pa. 1994).

243. *Id.* at 1318.

244. *See id.*

245. *See id.* at 1318-19.

246. *See id.* at 1319 (citing 42 U.S.C. § 12,102(2) (1994)).

[t]hat lay observation may have a certain common sense ring to it, but my role is not limited to construe the statute so that it might conform with a lay perception. Rather, I must read with care the definition of disability that Congress and the EEOC, gave us, and decide whether this plaintiff's disease and its symptoms fall within one or more of those express statutory and regulatory definitions, as anomalous as the statutory result might seem to some.<sup>247</sup>

Drawing upon the first prong of the ADA and the relevant EEOC regulations, the court concluded that the HIV-infected attorney was disabled.<sup>248</sup>

The court found that the HIV infection resulted in an impairment to the extent that it produced certain psychological disorders including fever, rash, and skin disorders.<sup>249</sup> Further, the court found the existence of impairment from the fact that HIV creates a physiological disorder of the hemic (blood) and lymphatic symptoms, citing a usual development of swollen lymph nodes created by HIV infection.<sup>250</sup>

In considering the issue of limitations on major life activities, the court considered the relevant EEOC regulations.<sup>251</sup> However, the court found no basis in the regulations for the claim that the relevant life activity under the statute were limited to work-life or work-activities.<sup>252</sup> While the plaintiff argued that HIV infection limited his ability to procreate, the court did not base its conclusion that the plaintiff was disabled on that basis. According to the court:

The factual record in this case is thin, indeed, as to whether HIV status is a disorder or condition that affects the "reproduction" system. No physicians testified as to that, and the parties seemed content to rely on administrative findings and the ruling of other judges . . . [such as] a case involving a plaintiff with full-blown AIDS . . . found in dictum that a person who is HIV-infected is substantially limited in a major life activity because of the significant risk of transmitting the HIV infection to a partner or a child, thereby endangering their lives.<sup>253</sup>

The court, nonetheless, specifically stated that, "[i]t is clear, therefore, that the language of the statute does not preclude procreating as a major life activity, but many will include it."<sup>254</sup> Thus, the court suggested procreation could constitute a major life activity, but such a showing was not necessary to establish

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247. *Id.*

248. *See id.* at 1319-20.

249. *See id.* at 1320 (construing 42 U.S.C. § 12,102(2); 29 C.F.R. § 1630.2(h) (1993)).

250. *See id.* (citing depositions of physicians who had treated the plaintiff).

251. *See id.* (citing *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (citing *Doe v. Dolton Elementary Sch. Dist.*, No. 148, 694 F. Supp. 440 (N.D. Ill. 1988) (describing in detail the effects of HIV infection on the body))).

252. *See id.* (citing 29 C.F.R. § 1630.2(i)).

253. *Id.*

254. *Id.*

that HIV-infection resulted in disability.<sup>255</sup> The court based its finding of disability on the physiological effects of HIV infection. The court concluded that the effect of the plaintiff's infection resulted in physical impairment that substantially limited one or more of the plaintiff's major life functions, and, therefore, he had a disability within the meaning of the ADA.<sup>256</sup> The court in *Doe v. Kohn Nast & Graf, P.C.*, based its conclusion on a two factor analysis: (1) HIV infection constituted an impairment, and (2) this impairment produced physical symptoms, or interference with physiological functions, in the form of fever, rash, weight loss, skin disorders, and swollen lymph nodes.<sup>257</sup>

The court went on to determine that the plaintiff did not satisfy the second prong of the definition of disability in the ADA, determining that the plaintiff neither had a record of such impairment, nor was he likely to establish that he was discriminated against because others regarded him as having such an impairment.<sup>258</sup> The court found the plaintiff did not have a record of such impairment because he was discharged only a few months after he tested HIV-positive. The court reasoned that this period of time was not long enough to constitute a history of impairment.<sup>259</sup> The court also suggested that the plaintiff was not likely to establish that members of the law firm perceived him to be impaired because there was a litany of legitimate reasons why plaintiff was fired.<sup>260</sup>

#### *D. HIV-Infection Treated as Disability Because of Infectiousness*

*Gates v. Rowland*,<sup>261</sup> decided in 1994 by the Ninth Circuit involved claims of discrimination within a correctional facility. The opinion of the court is significant for two reasons. First, the court did not draw a distinction between AIDS and HIV-infection, and second, because it found a disability to exist because of the "infectiousness" of HIV. The case was brought under the Rehabilitation Act of 1973,<sup>262</sup> but the court significantly cited the Americans with Disabilities Act and the Department of Justice Regulations promulgated under authority of that statute.<sup>263</sup>

The court's analysis began with consideration of the Supreme Court's opinion in *School Board of Nassau County v. Arline*.<sup>264</sup> The court noted that according to the *Arline* opinion, the contagious effects of a disease cannot be

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255. See *id.* at 1321.

256. See *id.* at 1320.

257. See *id.* at 1321.

258. See *id.*

259. See *id.* at 1322 (applying 29 C.F.R. § 1620.2(l), (k) (1993)).

260. See *id.*

261. 39 F.3d 1439 (9th Cir. 1994).

262. See *id.* at 1445 (citing 29 U.S.C. § 794(a) (1994)).

263. See *id.* at 1446 (citing 42 U.S.C. § 12,101(2); 28 C.F.R. § 35,104(4)(l)(ii)).

264. 480 U.S. 273 (1987)).

distinguished from the physical effects of a disease.<sup>265</sup> The court then cited its own opinion in *Chalk v. United States District Court* for the proposition that in determining the existence of handicap or disability, "the physical impairment to the individual is not the issue, but rather the issue is the contagious effect of the HIV virus."<sup>266</sup> With regard to infectiousness, the court concluded that there is no distinction to be made between persons with an AIDS diagnosis and those who are asymptomatic. The court noted that the ADA defines disability in virtually identical terms to the Rehabilitation Act of 1973.<sup>267</sup> The court further observed that the DOJ regulations implementing the ADA include in their catalogue of physical or medical impairments "HIV disease whether symptomatic or asymptomatic."<sup>268</sup> On this basis, the court stated: "[W]e hold that a person infected with the HIV virus is an individual with a disability within the meaning of the Act."<sup>269</sup>

## VII. CASE LAW FINDING PERSONS WITH HIV-INFECTION NOT PROTECTED UNDER THE ADA

### A. *A Particularized Determination That Asymptomatic HIV Infection Is Not a Disability*

*Ennis v. National Ass'n of Business and Educational Radio Inc.*, decided by the United States Court of Appeals for the Fourth Circuit in 1995, involved an employee who claimed she was fired because her employer wanted to avoid paying for medical insurance for her adopted son who was HIV-infected but asymptomatic.<sup>270</sup> The basis of this action was not a claim of prohibited discrimination of a "qualified individual with a disability" under the ADA. Instead, the suit was brought under a section of the ADA that prohibits employers from making adverse employment decisions against an employee "because of the known disability of a person with whom the qualified individual is known to have an association."<sup>271</sup>

The court in *Ennis* undertook an analysis of whether the HIV-infected child met any of the three prongs of the definition of disability set out in the ADA

265. See *Gates*, 39 F.3d at 1446 (citing *Arline*, 480 U.S. at 273).

266. *Id.* (construing *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988)).

267. See *id.* (comparing 42 U.S.C. § 12,101(2) (1994) and 29 U.S.C. § 706(8)(B) (1994)).

268. *Id.* (citing 28 C.F.R. § 35.104(4)(i)(ii) (1993)).

269. *Id.* See also *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991).

Whether or not asymptomatic HIV infection alone is defined as an actual "physical impairment," it is clear that this correctional system *treats* the inmates such that they are unable or perceived as unable, to engage in "major life activities" relative to the rest of the prison population . . . we believe that it is appropriate in this case to find seropositivity a "handicap" with the meaning of the Act.

*Id.*

270. *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995).

271. *Id.* at 57 (citing 42 U.S.C. § 12,112(b)(4)).

definition.<sup>272</sup> The court expressed skepticism about the authority of the EEOC regulations defining "impairment,"<sup>273</sup> rejected the notion that the ADA permitted recognition of any per se disability,<sup>274</sup> and stressed the need for a case specific finding of both an impairment and an actual limitation of a major life activity of the individual.<sup>275</sup>

According to the *Ennis* court, "the plain language of the [ADA's disability] provision requires that a finding of disability be made on an individual basis."<sup>276</sup> The court reasoned that the terms of the definition of disability anticipated a particularized determination.<sup>277</sup> Specifically, the court cited the terms of the statutory definition of disability that requires a finding of impairment "with respect to [the] individual," and the court stressed the requirement that the finding of an impairment must involve the determination that the impairment, "substantially limit[s] a major life activity of the individual."<sup>278</sup> Further, the court cited a number of federal court opinions including one of its own opinions, construing the Rehabilitation Act of 1973, that concluded "the question of who is a handicapped person under the Act is best suited to a 'case-by-case determination.'"<sup>279</sup>

The court went on to consider the factual evidence before it and concluded that there was no evidence in the record to support the view that the child in question was "impaired, to any degree, or that he currently endures any limitation, . . . on any major life activity."<sup>280</sup> The court did not explore the medical understanding of asymptomatic HIV infection, but simply assumed that a finding of disability required a finding of visible physical manifestations of the effects of HIV infection. The court found no such observable physical manifestations citing the mother's admission that "her son suffers no ailments or conditions that affect the manner in which he lives on a daily basis."<sup>281</sup>

The court in *Ennis* adopted the view that the only way asymptomatic HIV-infection could be found to be a disability would be to regard all HIV-infected persons as disabled. According to the court, in order to find the child "disabled under the ADA, therefore, we would have to conclude that HIV-positive status

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272. See *id.* at 59 (citing 42 U.S.C. § 12,102(2)).

273. *Id.* at 60-61 n.4 (discussing 29 C.F.R. § 1630.2(h)(1) (1994) and concluding that "[a]lthough uncertain of the EEOC's authority to promulgate this regulation . . . we do not understand this regulation to be in conflict with the above conclusion.").

274. See *id.*

275. See *id.* at 59-60.

276. *Id.* at 59.

277. See *id.*

278. *Id.*

279. *Id.* at 60 (quoting *Forrissi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); citing *Chandler v. City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992); *Byrne v. Board of Educ.*, 979 F.2d 560, 564-64 (7th Cir. 1992); *United States v. Southern Management Corp.*, 955 F.2d 914-18 (4th Cir. 1992)).

280. *Id.*

281. *Id.*



is per se a disability.”<sup>282</sup> Instead, the *Ennis* court took the view that

[t]he plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major activity, whether an individual has record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.<sup>283</sup>

Ultimately the court concluded that the facts as presented did not support the view that Ennis was discriminated against on the basis of her child's HIV-infection.<sup>284</sup>

*B. Asymptomatic HIV Is “Per Se” Not a Disability Under ADA:  
Runnebaum v. NationsBank of Maryland*

The *Runnebaum* opinions delivered by the Fourth Circuit represent the most restrictive view of the application of the disability provisions of the ADA to HIV-infected persons or, more particularly, to asymptomatic HIV-infected persons.<sup>285</sup> The final plurality en banc opinion rendered in the series of *Runnebaum* opinions can be characterized as amounting to a view that asymptomatic HIV-infection is per se not a disability under the terms of ADA.<sup>286</sup> Although the decision of the United States Supreme Court in *Bragdon v. Abbott*<sup>287</sup> effectively negates the significance of much of the approach taken by the Fourth Circuit in *Runnebaum II*, the possibility after the *Abbott* opinion remaining of individualized determination of disability under the ADA suggests the value of a close examination of the *Runnebaum* opinions. Part of the value of the *Runnebaum* opinion is the opportunity it affords to observe the approach to statutory analysis taken by the en banc plurality opinion in which limited its analysis to the facial language of the statute eschewing the legislative history and agency regulations that have played an important role in the opinions of other courts, including the opinion of the United States Supreme Court in *Bragdon v. Abbott*.<sup>288</sup>

William Runnebaum, diagnosed as having asymptomatic HIV-infection, claimed discrimination was the basis of the termination of his employment by

282. *Id.*

283. *Id.*

284. *See id.* at 62.

285. *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285 (4th Cir. 1996), *aff'd*, 123 F.3d 156 (4th Cir. 1997) (en banc) (“*Runnebaum II*”).

286. *See Runnebaum II*, 123 F.3d at 176 (Michael, J., dissenting). The dissent observes: “I believe the majority means to create a *per se* rule excluding those with asymptomatic HIV from the protections of the ADA.” However, the majority’s responds “[t]he dissent would, perhaps, have us hold that asymptomatic HIV infection is per se not a disability under the statute. As we discuss below, however, we decline to do so.” *Id.* at 167.

287. 524 U.S. 624 (1998).

288. *Compare Runnebaum II*, 123 F.3d at 169 n.7, with *Bragdon*, 524 U.S. at 624.

NationsBank of Maryland in violation of the ADA<sup>289</sup> and the Employment Retirement Income Security Act (ERISA).<sup>290</sup> To prevail on an ERISA claim, it was necessary for Runnebaum to establish the elements required by the ADA.<sup>291</sup> The federal district court, without issuing an opinion, granted the Bank's motion for summary judgment on the ground that Runnebaum failed to establish a prima facie case under the ADA.<sup>292</sup> A divided, three-judge panel of the Fourth Circuit reversed the district court's grant of summary judgment, holding that Runnebaum had established a prima facie case of discrimination based on disability and had raised issues of material fact as to whether he was fired because he was regarded as having a disability.<sup>293</sup>

The opinion rendered by the three-judge panel ("*Runnebaum I*") began its analysis by referring to the elements of discriminatory discharge set forth in the ADA, including the requirement that a plaintiff establish that he comes within the class of qualified persons for protection due to his disability.<sup>294</sup> Further, the court discussed the three prong definition of disability under the ADA<sup>295</sup> and the relevant EEOC regulations.<sup>296</sup> In addition, the court cited to judicial authority<sup>297</sup> and relevant regulations of various federal agencies<sup>298</sup> for the proposition that asymptomatic HIV-infection is a disability per se. Nevertheless, the court found the Fourth Circuit opinion in *Ennis v. National Ass'n of Business and Educational Radio* binding and required an individualized inquiry for a finding of disability under any of the three prongs of the ADA test.<sup>299</sup>

The majority of the three-judge panel concluded that Runnebaum presented

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289. 42 U.S.C. §§ 12,101-12,213 (1994 & Supp. III 1997).

290. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1997).

291. See *Runnebaum II*, 123 F.3d at 175 (citing *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991)).

292. See *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285, 1287 (4th Cir. 1996), *aff'd*, 123 F.3d at 156.

293. See *id.* at 1296.

294. See *id.* at 1289 (citing Title I of the ADA, 42 U.S.C. § 12,112 (1994)).

295. See *id.* (citing 42 U.S.C. § 12,102(2)).

296. See *id.* (citing 29 C.F.R. § 1630.2(a)(2) (1994)).

297. See *id.* at 1289-90 (citing *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Abbott v. Bragdon*, 912 F. Supp. 580, 585-86 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *and rev'd in part*, 524 U.S. 624 (1998); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 132 (N.D.N.Y. 1992); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990); *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814, 818 (W. Va. 1990)).

298. See *id.* at 1289 (citing 29 C.F.R. § 34.2 (Department of Labor); 28 C.F.R. § 35.104 (Department of Justice); 24 C.F.R. ch. 1, Subch. A., app. I (Department of Housing and Urban Development); 7 C.F.R. § 15e.103 (Department of Agriculture); 5 C.F.R. § 1636.103 (Federal Retirement Thrift Investment Board); 22 C.F.R. § 1701.103 (Institute of Peace); 45 C.F.R. § 2301.103 (Arctic Research Commission)).

299. See *id.* at 1290 (citing *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 59-60 (4th Cir. 1995)).

enough circumstantial evidence to establish a *prima facie* showing that he was terminated because he was regarded as having a disability<sup>300</sup> and that he was performing his job at an adequate level.<sup>301</sup> The court did not find it necessary to make specific findings regarding the effects of HIV-infection in relation to the terms "impairment" and "major life activity." Rather, the court found the evidence established that: (1) bank employees knew Runnebaum was HIV-positive [Runnebaum had reported his sero-positivity to a bank supervisor]; (2) bank employees knew Runnebaum was taking AZT to treat his condition because packages of his medication had been delivered to the bank and opened by bank employees; and (3) the bank supervisor to whom Runnebaum had disclosed his HIV infection reported that he felt "panicky" and "uncontrolled" and believed death might be imminent for Runnebaum upon being informed of his condition.<sup>302</sup> The court concluded that this was enough to meet the evidentiary requirements that the bank perceived Runnebaum as having an impairment that substantially limited a major life activity.<sup>303</sup> The court dismissed the argument that Runnebaum's claim was undermined by the fact that he checked a box on an employment form indicating that he was not handicapped at the time he applied for the job in the Bank's trust department.<sup>304</sup> Instead, the court stressed that "the attitudes of others determine whether a person has a disability within the meaning" of the ADA.<sup>305</sup>

The court extensively discussed the reported reaction of the bank supervisor to Runnebaum's disclosure of his status as HIV-positive.<sup>306</sup> The court noted that while there is a distinction between disabilities apparent to a casual observer ("[a]n employer can see a wheelchair, a guide dog, or a hearing aid") and those that are not visible to the naked eye, both types of disabilities are covered by the ADA.<sup>307</sup> Moreover, the court noted, "[w]hen a disability is not readily apparent, an employer's reaction upon learning of the disability can be relevant to a finding of discrimination. Specifically, an employer's immediate reaction offers an insight into his later firing a disabled employee."<sup>308</sup> The reaction of the supervisory bank employee, coupled with the fact that this employee reported his knowledge of Runnebaum's HIV infection to the individual who was ultimately responsible for terminating Runnebaum, satisfied the court that Runnebaum had presented sufficient evidence to raise a genuine issue of material fact as to

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300. *See id.*

301. *See id.* at 1291.

302. *Id.* at 1296.

303. *See id.* at 1291.

304. *See id.* at 1290 n.2.

305. *Id.*

306. *See id.* at 1290.

307. *Id.* at 1295.

308. *Id.* at 1295 n.8 (citing *Lempres v. CBS Inc.*, 916 F. Supp. 15, 23 n.37 (D.D.C. 1996) (Pregnancy Discrimination Act plaintiff must meet requirements similar to those of ADA plaintiffs. Pregnancy is not observable at first, yet an employer's reaction upon learning an employee is pregnant may provide basis for finding discriminatory discharge.)).

whether he was fired because he was regarded as having HIV disease.<sup>309</sup>

However, the dissenting opinion in *Runnebaum I* concluded that even if Runnebaum had established that he was an individual with a disability and had met the requirements for a prima facie case of discrimination under the ADA, the Bank had presented sufficient evidence to establish a legitimate, non-pretextual, non-discriminatory reason for his discharge.<sup>310</sup> Specifically, the dissent maintained Runnebaum failed to establish that he was meeting the Bank's legitimate expectations at the time of his discharge.<sup>311</sup>

Also, it is significant that the dissent did not find that Runnebaum met the three-prong definition of disability in the ADA.<sup>312</sup> The dissent agreed with the majority that Runnebaum was required to establish the presence of an "impairment" affecting a "major life activity." However, the dissent maintained that the majority had provided no significant analysis of the facts in the case to support the conclusion that the terms of the statute were satisfied.<sup>313</sup> In a footnote, the dissent briefly addressed whether Runnebaum was disabled because he suffered an actual physical or mental impairment as a result of being HIV positive.<sup>314</sup> Because Runnebaum was asymptomatic for approximately four years prior to his termination, the dissent maintained he had neither suffered affliction from his HIV infection, nor experienced any significant side effects from the prescribed AZT medication.<sup>315</sup> The dissent concluded, without citation to the record, that: "Runnebaum has consistently maintained that he endures no impairment that substantially limits a major life activity, thereby proving that he is not disabled under the first prong of the ADA's definition of a disability."<sup>316</sup> The dissent then addressed the question of whether Runnebaum was "regarded as" disabled because of his asymptomatic HIV-infection.<sup>317</sup> The dissent maintained that Runnebaum's disclosure of his HIV-infection to a fellow bank employer was done in a social context in the form of a discussion between friends.<sup>318</sup> The reported feelings of "panic" were viewed by the dissent as the natural reaction of an associate of being "disheartened on learning that his friend was HIV-positive."<sup>319</sup> Moreover, the dissent concluded that the fellow employee "was solicitous of Runnebaum's health and sympathetic to Runnebaum's needs, with the fellow employee styling himself as Runnebaum's 'protector.'"<sup>320</sup> Finally, the dissent observed that no showing was made to link knowledge of

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309. See *id.* at 1297.

310. See *id.* at 1305 (Williams, J., dissenting).

311. See *id.* at 1303.

312. See *id.* at 1302 (finding that 42 U.S.C. § 12,102(2) (1994) does not apply).

313. See *id.*

314. See *id.* at 1303 n.5.

315. See *id.* (citing the trial record).

316. *Id.*

317. *Id.* at 1302.

318. See *id.* at 1302-03.

319. *Id.*

320. *Id.* at 1303.

Runnebaum's HIV status to the decision to discharge him; therefore, the dissent concluded that "Runnebaum failed to show that he was regarded as having a disability."<sup>321</sup>

The Fourth Circuit vacated the opinion issued in the three-judge panel in *Runnebaum I* and granted an en banc rehearing.<sup>322</sup> The issues before the en banc court were somewhat altered as the result of an amicus brief to the Fourth Circuit filed by the legal department of Whitman-Walker Clinic ("WWC"), a community health center in Washington, D.C. specializing in services related to AIDS and HIV-infection, along with a brief filed by the EEOC. WWC's brief argued that a person with HIV-infection has an "impairment" under the terms of the ADA "because from the outset it [HIV] infects the blood and lymphatic system and progressively destroys the immune system."<sup>323</sup> Similarly, the WWC brief maintained that all persons with HIV infection, whether symptomatic or asymptomatic, meet the definition of "disability" in the ADA because their viral infection substantially limits major life activities including parenting and pageantry, intimate personal relations, the ability to plan for the future, certain career options, access to health, life and disability insurance, and the ability to travel.<sup>324</sup>

The WWC brief provided an account of HIV infection and AIDS that portrays the disease progressing through various phases, rather than as a series of independent disease conditions.<sup>325</sup> HIV infection is said to mark the start of disease progression which, within a month, is likely to be manifested in a short-term mononucleosis-like condition.<sup>326</sup> Although antibodies can be detected in the blood within six months of infection, a person may not manifest any significant observable physical symptoms, the so-called "asymptomatic phase."<sup>327</sup> However, the WWC brief pointed out that during this so-called asymptomatic phase, HIV is active in the hemic (blood) and lymphatic system and compromising the immune system ("progression of HIV disease is associated with characteristic immunopathic changes in lymphoid tissue").<sup>328</sup> Medical treatment following a determination of HIV infection may include, among other interventions, dietary plans and medication including protease inhibitors to slow viral reproduction.<sup>329</sup>

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321. *Id.*

322. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (en banc).

323. Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services at 3, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (en banc) (No. 94-2200) (supporting plaintiff/appellant on the issue of disability).

324. *Id.* at 4.

325. *See id.* at 5.

326. *See id.* (citing JOHN G. BARTLETT, MEDICAL MANAGEMENT OF HIV INFECTION 2-3 (1995)).

327. *Id.* (citing BARTLETT, *supra* note 326, at 3-4).

328. *Id.* at 6 (citing Oren J. Cohen et al., *Pathogenic Insights from Studies of Lymphoid Tissue from HIV-Infected Individuals*, 10 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES & HUMAN RETROVIROLOGY 56, 56-512 (Supp. I 1995)).

329. *See id.* at 7 (citing RONALD A. BAKER ET AL., EARLY CARE FOR HIV DISEASE 22-23

As physical symptoms develop, including opportunistic infections and disease, one is ultimately diagnosed with AIDS.<sup>330</sup>

The WWC brief also addressed the issue of whether HIV infection should be regarded as a per se disability.<sup>331</sup> Maintaining that the language of the ADA does not preclude HIV infection from being regarded as a disability, the WWC brief argues, "treating HIV disease as a per se disability is not inconsistent with the existence of impairment which substantially limits major life activities in every afflicted individual. For instance, blindness and deafness are impairments that inherently are substantially limiting."<sup>332</sup>

The en banc hearing in *Runnebaum II* resulted in a split opinion: six justices agreed that Runnebaum was not disabled and had failed to show he was fired because he was regarded as disabled;<sup>333</sup> one justice concurred in the judgment that Runnebaum had failed to establish that he was fired because of a disability but maintained that the question of whether Runnebaum was disabled was not before the court;<sup>334</sup> five justices dissented maintaining that Runnebaum had presented sufficient evidence of disability and discrimination to defeat summary judgment.<sup>335</sup>

In *Runnebaum II*, the majority of the en banc panel of the Fourth Circuit affirmed the district court's grant of summary judgment in favor of NationsBank, holding that Runnebaum had failed to establish a prima facie case of discrimination based on disability in violation of the ADA.<sup>336</sup> The court held that Runnebaum's asymptomatic HIV-infection was not shown to have resulted in a disability; that Runnebaum had failed to show that his employer perceived him to be disabled; that Runnebaum had failed to raise a reasonable inference of unlawful discrimination; and, that Runnebaum's employer had articulated legitimate non-pretextual, non-discriminatory reasons for Runnebaum's discharge.<sup>337</sup>

To overcome the grant of summary judgment, the Fourth Circuit noted that Runnebaum was required to establish a prima facie case of discrimination under the ADA.<sup>338</sup> The majority in *Runnebaum II* recognized that to establish a prima facie case of discrimination in a discharge case under the ADA, the plaintiff is required to prove by a preponderance of the evidence that he was (1) a member

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(1991); BARTLETT, *supra* note 326, at 61-63, 279-84; Marianna K. Baum et al., *Micro nutrients and HIV-1 Disease Progression*, 9 AIDS 1051-55 (1995)).

330. See *id.* (citing Lynda S. Doll & Beth A. Dillon, *Counseling Persons Seropositive for Human Immunodeficiency Virus Infection and Their Families*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 533 (Vincent T. DiVita, Jr. et al. eds., 4th ed. 1997)).

331. See *id.* at 15-23.

332. *Id.* at 17 (emphasis added).

333. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 176 (4th Cir. 1997) (en banc).

334. See *id.*

335. See *id.* at 176-89.

336. See *id.* at 175.

337. See *id.* at 164-75 (applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

338. See *id.* at 164 (applying *McDonnell Douglas Corp.*, 411 U.S. at 792).



of the protected class ("a qualified individual with a disability" as defined by the ADA); (2) discharged; (3) performing his job at a level that met the employer's legitimate expectations at the time of his discharge; and (4) discharged under circumstances that raise a reasonable inference of unlawful discrimination.<sup>339</sup>

The majority devoted considerable attention to the contention that Runnebaum was an individual with a disability under the ADA because he was HIV-positive or was diagnosed with asymptomatic HIV infection.<sup>340</sup> Although the previous court opinions involving Runnebaum did not undertake such analysis, the majority noted that the WWC and the EEOC appearing as amicus curiae took the position that asymptomatic HIV infection is a disability per se under the ADA.<sup>341</sup>

Following the approach of all courts undertaking an analysis of whether HIV-infection is a disability, the majority in *Runnebaum II* began its analysis by considering the four-prong definition of disability in the ADA.<sup>342</sup> Following its own opinion in *Ennis*, the Fourth Circuit maintained that a finding of disability must be made on an individualized basis.<sup>343</sup> The court avoided consideration of the suggestion made in the brief of the WWC that an individualized assessment does not preclude the fact that a particular condition constitutes a per se disability. It is clear, for example, that a case-by-case analysis of individuals who were blind would always result in a finding of disability because blindness would always constitute an impairment that would substantially limit the individual's major life activity of seeing.<sup>344</sup>

Instead, the majority proceeded to consider (1) whether asymptomatic HIV infection is a physical or mental impairment, and (2) whether asymptomatic HIV infection, if an impairment, substantially limits one or more major life activities.<sup>345</sup> The majority was quick to note that the Supreme Court had yet to rule on the issue of whether asymptomatic HIV infection constituted an impairment, citing the footnote in *School Board of Nassau County v. Arline*, in which the Supreme Court in 1987 declined to reach a decision on the issue.<sup>346</sup> Surprisingly, in the *Runnebaum II* opinion in 1997, the majority did not seem to have a clue as to the approach that would be taken by the Supreme Court in 1998.<sup>347</sup> The Supreme Court in fact relied on a significant body of case law

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339. *Id.* (construing 42 U.S.C. § 12,112(2) (1994) and citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995)).

340. *See id.* at 165-73.

341. *See id.* at 161 n.1, 165-66.

342. *See id.* at 166 (citing 42 U.S.C. § 12,102(2)).

343. *See id.* (citing *Ennis*, 53 F.3d at 59).

344. *See* Brief of Amicus Curiae, *supra* note 323, at 16-17, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997)).

345. *See Runnebaum II*, 123 F.3d at 167, 170 (citing 42 U.S.C. § 12,102(2)(A)).

346. *See id.* at 167 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 n.7 (1987) (declining to decide whether any asymptomatic HIV-infected person could be considered to have a physical impairment)).

347. *See Bragdon v. Abbott*, 524 U.S. 624 (1998).



developed after 1987 adopting an approach that considered relevant the extensive body of medical and scientific literature, the legislative history, the regulations promulgated by designated agencies, and the large body of judicial opinions considering the issue.<sup>348</sup> The *Runnebaum II* majority found it easy to dismiss this body of authority as irrelevant even though the court in *Runnebaum I* repeatedly cited the district court opinion in *Abbott v. Bragdon*.<sup>349</sup> The Supreme Court ultimately upheld this opinion overruling sub-siliention a number of the findings adopted by the *Runnebaum II* majority. Rather, the *Runnebaum II* approach to determining the applicability of the ADA to the facts established by *Runnebaum* involves the court's use of a currently fashionable approach to statutory interpretation, embraced under the claim of judicial restraint that limits, wherever possible, judicial inquiry in statutory interpretation to the language of the statute under the rubric of plain language analysis.<sup>350</sup> This *Runnebaum II* approach adopts three maxims of statutory interpretations: (1) "When confronted with a question of statutory interpretation, our inquiry begins with an examination of the language used in the statute;"<sup>351</sup> (2) Where "statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise" since the court should apply the statute in conformity to the language used;<sup>352</sup> and (3) When "a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."<sup>353</sup>

In taking this approach, the *Runnebaum II* majority does not follow the approach to statutory interpretation favored by most courts that begin their analysis with a consideration of the definition of "impairment" given by the designated federal agency, in this case the EEOC.<sup>354</sup> Instead, the court looked to four separate dictionaries for the meaning of a term which it assumes to be understood as a matter of "standard" usage rather than as a matter of "statutory" usage and the intent of the drafters of the statute.<sup>355</sup> The court focused on the

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348. See *id.*

349. 912 F. Supp. 580 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997) (discussing issue of whether procreation and intimate sexual relations are "major life activities"), *and rev'd in part*, 524 U.S. 624 (1998). See *Runnebaum II*, 123 F.3d at 168-70 (citing *Abbott*, 107 F.3d at 939-41 (holding that asymptomatic HIV is always an impairment and that procreation is a major life activity)).

350. See *Runnebaum II*, 123 F.3d at 167.

351. *Id.* (citing *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996), *cert. denied*, 519 U.S. 1077 (1997)).

352. *Id.* (citing *United States v. Murphy*, 35 F.3d 143, 143-45 (4th Cir. 1994)).

353. *Id.* (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

354. See, e.g., *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 773 n.18 (E.D. Tex. 1996) (citing 29 C.F.R., § 1630, app. to Part 1630-Interpretations Guidance to Title I of the APA § 1630.2(g) (1995)).

355. *Runnebaum II*, 123 F.3d at 167 (citing definition of term "impair" in BLACKS LAW DICTIONARY 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner"); WEBSTER'S II NEW REVISED UNIVERSITY DICTIONARY 612 (1988) ("[D]ecrease in strength, value, amount, or quality"); WEBSTER'S NINTH NEW

definition of "impair[ment]" as to "make worse by or as if by diminishing in some material respect" provided in *Webster's Ninth New Collegiate Dictionary*.<sup>356</sup> From this type of definition the *Runnebaum II* majority adopted the totally unjustified view that an impairment must have some external observable physical "symptomatic" manifestation.<sup>357</sup> The *Runnebaum II* majority reasoned that the required showing of impairment "cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength."<sup>358</sup> According to the court: "[A]symptomatic HIV infection is simply not an impairment: without symptoms, there are no diminishing effects on the individual."<sup>359</sup>

The *Runnebaum II* majority misconstrued the meaning of both the term "impairment" and the term "asymptomatic HIV infection" because of its simplistic understanding of language, namely that words have a clear meaning independent of context and usage. The term "impairment" as it relates to the question of whether a person is disabled within the terms of the ADA is to be understood in the context of the Americans with Disabilities Act, enacted by Congress and enforced by designated agencies under duly promulgated regulations. The term "asymptomatic HIV infection is to be understood in the context of medical usage rather than simply meaning "no symptoms." Certain facts about HIV infection have long been known. For example, an asymptomatic HIV-infected person's condition may not always be detectable by superficial physical observation even though such a person is infected and infectious,<sup>360</sup> has a compromised immune system,<sup>361</sup> may not engage in "unprotected" intercourse without assuming the risk of infecting the sexual partner,<sup>362</sup> often cannot engage in specified sexual acts without violating criminal laws that imposes penalties for such sexual conduct,<sup>363</sup> and may not engage in reproduction without some

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COLLEGIATE DICTIONARY 603 (1986) ("[M]ake worse by or as if by diminishing in some respect"); and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (1986) ("[D]eterioration" or "lessening"). Cf. definition of "impairment" in STEDMAN'S MEDICAL DICTIONARY 857 (26th ed. 1995) ("[a] physical or mental defect at the level of a body system or organ." The official World Health Organization definition is "any loss or abnormality of psychological, physiological or anatomical structure or function").

356. *Runnebaum II*, 123 F.3d at 168 (emphasis added) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986)).

357. *Id.*

358. *Id.* (citing *Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986)).

359. *Id.*

360. See generally Redfield & Burke, *supra* note 6, at 90.

361. See William Long et al., *Clinical, Immunologic, and Serologic Findings in Men at Risk for Acquired Immunodeficiency Syndrome: The San Francisco Men's Health Study*, 257 JAMA 326 (1987).

362. Centers for Disease Control Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS, 36 MMWR 509 (1987).

363. See, e.g., FLA. STAT. § 384.24 (West 1998); 720 ILL. COMP. STAT. § 5/12-16.2(d) (West 1993); LA. REV. STAT. ANN. § 14:43.5 (West 1997).

likelihood of producing an infected child.<sup>364</sup> The court, in regarding physical symptoms as the *sine qua non* of impairment, overlooks the fact that laboratory tests of asymptomatic HIV-infected persons would reveal the “diminishing” effects of HIV infection and the “decrease in strength, value, amount or quality” of the immune system of infected persons by revealing the presence of the virus in the blood cells of the HIV-infected person as well as by the reduction in the T-cell count of the individual indicating a suppressed immune system.<sup>365</sup> Certainly, after the Supreme Court’s decision in *Arline*, the *Runnebaum II* court should have recognized that a finding of disability does not necessarily require obvious physical manifestation of symptoms.

Instead, the *Runnebaum II* court adopted a simple two-step analysis in order to reach the conclusion that asymptomatic HIV infection does not constitute an “impairment.” According to the court: (1) “[t]he plain meaning of ‘impairment’ suggests that asymptomatic HIV infection will never qualify as an impairment by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual”<sup>366</sup>; and (2) “[e]xtending the coverage of the ADA to asymptomatic conditions like Runnebaum’s where no diminishing effects are exhibited, would run counter to Congress’s intention as explained in the plain statutory language.”<sup>367</sup>

The *Runnebaum II* majority recognized that other courts had found asymptomatic HIV infection constituted an impairment under the ADA.<sup>368</sup> However, the court construed these opinions as inappropriately relying on legislative history that the *Runnebaum II* court found ambiguous.<sup>369</sup> For example, the House and Senate reports indicated that the term “mental or physical impairments” includes “infection with the Human Immunodeficiency Virus.”<sup>370</sup> By employing the “plain” language approach, the court totally ignored the legislative record that indicated that Congress understand HIV infection, whether symptomatic or asymptomatic, to constitute a disability. The distinction was clearly known to the members of Congress enacting legislation and their intention to provide disability protection to those who suffered from asymptomatic HIV infection was consummately clear in the record, through

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364. See, e.g., Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173 (1994).

365. See, e.g., Michael S. Saag, *Natural History of HIV-1 Disease*, TEXTBOOK OF AIDS MEDICINES 45, 49 (Samuel Broder et al. ed. 1994); CECIL, TEXTBOOK OF MEDICINE 1908 (James B. Wyngarden et al. eds., 19th ed. 1992).

366. *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 169 (4th Cir. 1997) (en banc).

367. *Id.* at 168.

368. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997) (concluding that asymptomatic HIV infection is an impairment under the ADA), *rev'd in part*, 524 U.S. 624 (1998); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994)).

369. See *id.*

370. *Id.* at 168-69 (citing H.R. REP. NO. 101-485 (II), *reprinted in* 1990 U.S.C.C.A.N. § 303; H.R. REP. NO. 101-485 (III), *reprinted in* 1990 U.S.C.C.A.N. § 445; S. REP. NO. 101-116 (1989)).

statements in the contemporary Congressional Record.<sup>371</sup> However, the *Runnebaum II* majority maintained that “the isolated references to HIV infection in the Committee Reports do not distinguish between symptomatic and asymptomatic conditions as the plain meaning of ‘impairment’ requires.”<sup>372</sup> The court’s talisman of statutory interpretation, the plain meaning approach, allows it to reach what it views as an apparently transparent conclusion that “the statutory meaning of ‘impairment’ is plain and unambiguous. Accordingly, we have no reason to resort to the legislative history to ascertain Congress’s intent.”<sup>373</sup>

The *Runnebaum II* majority further considered whether asymptomatic HIV infection substantially limits one or more of the major life activities assuming *arguendo* that asymptomatic HIV infection constitutes an impairment.<sup>374</sup> Noting that the ADA itself does not define “major life activity,” the court did not turn to the relevant EEOC regulations and related judicial interpretation. Instead the court invoked its vehicle of statutory interpretation, “ordinary and natural meaning.”<sup>375</sup> The court’s analysis focused on dictionary definitions<sup>376</sup> of the term “major” to reach the unsurprising understanding that “[t]hese definitions suggest that an activity qualifies under the statutory definition as one of the major life activities contemplated by the ADA if it is relatively more significant or important than other life activities.”<sup>377</sup> The deficiency of the courts approach to statutory interpretation became clear when one compares it to the information one can quickly glean from an examination of the EEOC regulations and guidelines discussed earlier in this article.<sup>378</sup>

One aspect of the *Runnebaum II* analysis that may prove important in subsequent litigation relates to what the court suggested must be shown to be the relationship between the “major life activity” impaired by HIV infection and the individual plaintiff’s relationship to that activity, i.e., must it be an activity that the individual desires to or would be engaged absent the impairment.<sup>379</sup> The *Runnebaum II* majority comes to the surprising conclusion that “courts need only consider whether the impairment at issue substantially limits the plaintiff’s ability to perform one of the major life activities contemplated by the ADA, not

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371. See, e.g., 136 CONG. REP. H2626 (May 22, 1990) (remarks of Rep. McDermott) (“I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease. These are individuals who have any condition along the full spectrum of HIV infection—asymptomatic HIV-infection, symptomatic HIV infection, or full blown AIDS.”).

372. *Runnebaum II*, 123 F.3d at 169.

373. *Id.* at 168 (citations omitted).

374. See *id.* at 170 (citing 42 U.S.C. § 12,102(2)(A) (1994)).

375. *Id.* (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

376. See *id.* (citing WEBSTER II NEW RIVERSIDE UNIVERSITY DICTIONARY 718 (1988); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1986)).

377. *Id.*

378. Compare discussion of “major life activity” in *Runnebaum II*, 123 F.3d at 171, with 29 C.F.R. § 1630.2(i) (1999) and 29 C.F.R. Appendix to § 1630.2(i).

379. See *Runnebaum II*, 123 F.3d at 170.

whether the particular activity that is substantially limited is important to him.”<sup>380</sup> This view, of course, leaves open another aspect of the relationship between the impairment of HIV infection and the ability of the individual to otherwise engage in the activity; even if reproduction is a major life activity impaired by HIV-infection, would a post-menopausal women, who would not be capable of engaging in reproductive activity, be regarded as disabled because of the effect of HIV-infection on the ability to engage in reproductive activity?

The *Runnebaum II* majority also addressed the question of whether procreation and intimate sexual relations are major life activities for the purpose of ADA disability coverage.<sup>381</sup> Conceding that each of these is a “fundamental human activity,”<sup>382</sup> the court, nevertheless expressed doubt as to whether these are “major life activities” under the ADA.<sup>383</sup> Without deciding whether the activities are included within the meaning of major life activities under the ADA, the *Runnebaum II* majority concludes, that even assuming that they are covered activities, asymptomatic HIV-infection does not “substantially limit” the ability to procreate or engage in intimate sexual relations.<sup>384</sup> The court gave significant weight to the 1988 DOJ Memorandum that opined that some courts might find asymptomatic HIV infection limits procreation because individuals will forego having children for fear of producing an infected child, and because individuals will forego intimate sexual relations because of fear of infecting others.<sup>385</sup> However, in the courts view the 1988 DOJ Memorandum equivocated on this issue since it stated that “there is nothing inherent in the [HIV] infection which actually prevents either procreation or intimate [sexual] relations.”<sup>386</sup>

The court further held that asymptomatic HIV infection does not limit procreation or intimate sexual relations for purposes of the ADA.<sup>387</sup> The court reasoned that asymptomatic HIV infected individuals can and have procreated and have engaged in intimate sexual relations.<sup>388</sup> The court sees the decision to be one of behavior and mores and not one involving a “causal nexus between the physical effect of the impairment and one of the major life activities.”<sup>389</sup> One

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380. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997), *rev'd in part*, 524 U.S. 624 (1998)).

381. See *id.* at 170-72.

382. *Id.* at 170 (citing WWC Brief at 19-20; EEOC Brief at 17).

383. *Id.* (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that procreation is not one of the major life activities under the ADA); *Zatarin v. WDSU Television, Inc.*, 79 F.3d 1143 (5th Cir. 1996), *aff'g* 881 F. Supp. 240, 243 (E.D. La. 1995)).

384. *Id.* at 172.

385. See *id.* at 171-72 (discussing Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 641 at 405:4-7) [hereinafter *Kmiec Memorandum*].

386. *Id.* at 171 (citing *Kmiec Memorandum*, *supra* note 385, at 405:7).

387. See *id.* at 172.

388. See *id.*

389. *Id.* (construing 42 U.S.C. § 12,102(2)(A) (1994)).

might observe that under this analysis a monk who had undertaken the vow of silence would not be disabled because his decision not to speak was not a matter of physical inability but a choice made in pursuance of self mortification.

To some extent, one must question the integrity of the court's reasoning in *Runnebaum II*. It is pervaded with inconsistency. When accused by the dissent of taking the position that asymptomatic HIV-infection is per se not a disability, the majority countered with the statement "[t]he dissent would, perhaps, have us hold that asymptomatic HIV infection is per se not a disability under the statute. As we discuss below, however, we decline to go so far."<sup>390</sup> Later, however, the court concluded "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an impairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual."<sup>391</sup> Similarly, the court initially took the position that "courts need only consider whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities contemplated by the ADA, not whether the particular activity that is substantially limited is important to him."<sup>392</sup> In complete contradiction to this position, the court determined that even if procreation and intimate sexual relations are major life activities, the lack of evidence of Runnebaum's intention to otherwise engage in these activities precluded a finding that he was disabled.<sup>393</sup> The *Runnebaum II* majority reasoned:

Even if the statute permitted a finding that asymptomatic HIV infection substantially limits procreation and intimate sexual relations because of a person's response to the knowledge of his infection, there is no evidence in the record that Runnebaum, because of his infection, forewent having children or engaging in intimate sexual relations. Nothing in the record indicates that Runnebaum refrained from having children out of fear that he would pass the virus on to his child. Indeed, nothing in the record so much as suggests that Runnebaum was at all interested in fathering a child. Moreover, the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection; the record shows that he concealed his HIV infection from his lover. Ergo, Runnebaum's HIV infection, if an impairment, does not substantially limit one or more of the major life activities . . . .<sup>394</sup>

The court's straightforward ability to take contrary positions is only exceeded by its arrogance in concluding that Runnebaum's decision not to disclose his HIV status to his partner meant that he was having unprotected sexual relations with

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390. *Id.* at 167. *Cf. id.* at 176 (Michael, J., dissenting).

391. *Id.* at 169.

392. *Id.* at 170.

393. *See id.* at 172.

394. *Id.*



his lover of the kind that would facilitate transmission of HIV.<sup>395</sup> Finally, the court turned a blind eye to the existence of criminal statutes providing severe penalties for individuals who engage in intimate sexual relations of the type likely to facilitate transmission of HIV.<sup>396</sup>

After expounding at length on whether Runnebaum was disabled, an issue apparently conceded at the trial level,<sup>397</sup> the court turned to the actual claim that NationsBank fired Runnebaum because it regarded him as having an impairment that substantially limited one or more of the major life activities.<sup>398</sup> The court concluded that none of the evidence submitted by Runnebaum was sufficient to create a genuine issue of material fact establishing that NationsBank perceived Runnebaum as disabled.<sup>399</sup> Moreover, the court concluded that the evidence did not show that Runnebaum was meeting his employer's legitimate expectations, nor did the evidence show that Runnebaum's termination took place under circumstances raising a reasonable inference of discrimination.<sup>400</sup>

The extensive dissent in *Runnebaum II*<sup>401</sup> not only came to different conclusions on every issue discussed by the majority, but also expressed the opinion that there was a disingenuousness in the majority's opinion particularly with regard to the majority's position that "Runnebaum produced no evidence showing that he was impaired, to any degree, during the relevant time period."<sup>402</sup> The dissent points out that at the trial level hearing on the motion for summary judgment, the employer conceded the issue of existence of "impairment," therefore, no evidence was presented on this issue.<sup>403</sup> It is clear from the record that NationsBank conceded that Runnebaum was disabled under the terms of the

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395. See *id.* Cf. *id.* at 185 (Michael, J., dissenting):

Regarding intimate sexual relations, the majority makes the bold assertion: "the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection; the record shows that he concealed his HIV infection from his lover." . . . That is too much of a leap for me. I would not presume to know the status of Runnebaum's 'intimate sexual relations' merely because he has a boyfriend.

396. See, e.g., FLA. STAT. § 384.24 (West 1998); 720 ILL. COMP. STAT. § 5/12-16.2(d) (West 1993); LA. REV. STAT. ANN. § 14:43.5 (West 1997).

397. Compare *Runnebaum II*, 123 F.3d at 177-78 (where the dissent maintains the defendant conceded Runnebaum's disability in district court), with *id.* at 165 n.4 (where the majority asserts that the district court merely assumed "for the purpose of the [summary judgment] motion, that even an asymptomatic HIV infection may be a disability . . ." concluding "[w]hether asymptomatic HIV infection is a disability under the statute is primarily a question of law, the facts pertaining to this issue are sufficiently developed, and the issue was briefed [by Runnebaum's counsel] and argued on appeal.").

398. See *id.* at 172-76.

399. See *id.* at 173-76.

400. See *id.* at 175-76.

401. See *id.* at 176-90 (Michael J., dissenting).

402. *Id.* at 178 (citing *id.* at 169 (majority opinion)).

403. *Id.* at 177.



ADA and, consequently he suffered the necessary "impairment."<sup>404</sup> In its memorandum to support a motion for summary judgment, NationsBank acknowledged that the plaintiff "is a member of a protected class (HIV-positive being a protected category under 42 U.S.C. § 12,102([2]))."<sup>405</sup> The dissent also quoted Runnebaum's lawyer's statement at the en banc hearing where the lawyer states in part "[i]t was assumed that he [Runnebaum] met the standards under the Act to be disabled, and the whole case was premised, discovery and everything was premised from that point forward, on the fact that it was conceded that he was disabled."<sup>406</sup>

The dissent also observed that the majority did not develop an accurate account of the disabling effects of asymptomatic HIV infection.<sup>407</sup> The dissent cited medical authorities that describe the effect of the virus' immediate attack on the immune system, along with the presence of the virus and its reproduction in the hemic (blood) and lymphatic systems with measurable decline in CD4 cell counts.<sup>408</sup> The dissent explicitly rejected the majority's contention that an ADA impairment must involve the exhibition of observable physical symptoms. Instead, the dissent maintained "[n]owhere does the text of the statute, however, require a 'physical impairment' to be outwardly visible or manifest. The effects of the HIV virus may not be noticeable to the outside world until the later stages of the disease, but the body is impaired as soon as the disease enters it."<sup>409</sup> Moreover the dissent takes notice of the Fourth Circuit's own opinion in *Doe v. University of Maryland Medical System, Corp.*, where the court found an HIV-infected surgeon not otherwise qualified to carry out his surgical functions because of his HIV infection, for the proposition that infectiousness or contagiousness might constitute an impairment establishing the basis for a claim that an individual was disabled within the meaning of the ADA.<sup>410</sup> Next the dissent faulted the majority for its total disregard of legislative history, regulatory interpretation, and the substantial body of judicial construction that runs directly

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404. *Id.*

405. *Id.* (citing trial transcript).

406. *Id.* at 178 (citing en banc Oral Argument, Mar. 5, 1997).

407. *See id.* at 180.

408. *See id.* (citing CECIL, *supra* note 365, at 1908) (describing slow progressive decline in CD-4 positive cells); Martin A Nowak, *AIDS Pathogenesis: From Models to Viral Dynamics in Patients*, 10 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES & HUMAN RETROVIROLOGY, S1 (Supp. 1, 1995) (noting effect of infection in viral levels and decline in CD4 cell counts); Saag, *supra* note 365, at 46 (describing infection resulting in acute retroviral seroconversion syndrome); Christine Gorman, *Battling the AIDS Virus: There's Still No Cure, but Scientists and Survivors Make Striking Progress*, TIME, Feb. 12, 1996, at 62 (virus is active in body from time of infection)).

409. *Id.* at 181 (citing Letter from C. Everett Koop, M.D., Surgeon General to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, reprinted in 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 641 at 405:18, 405:19).

410. *See id.* at 181 n.5 (citing *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995) (potential for HIV transmission by infected surgeon made him not otherwise qualified)).

contrary to the various conclusions of the majority.<sup>411</sup>

While the dissent did not totally reject the “plain meaning” approach to statutory interpretation, the dissent maintained that the statutory terms of the ADA are sufficiently ambiguous to require guidance from the legislative history and implementing regulation.<sup>412</sup> The dissent observed that both the House and Senate Committee Reports accompanying enactment clearly stated that HIV infection is to be considered an ADA impairment.<sup>413</sup> Moreover, specific remarks of certain sponsors are unequivocal. For example, the statement of Senator Kennedy noting that “in the particular provision of the legislation we have pointed out very clearly, if you are asymptomatic and HIV positive, you are protected.”<sup>414</sup> In addition, the dissent found confirming support in the relevant implementing regulations of the agency, designated by Congress, that are virtually ignored by majority.<sup>415</sup>

The dissent next examined the requirement of the ADA that the impairment substantially limit one or more major life activities.<sup>416</sup> The dissent concluded that the language of the statute, the legislative history, and implementing regulations all support the view that procreation and intimate sexual activity are major life activities.<sup>417</sup> The dissent directed attention to the distinction drawn by the majority between “substantially limiting as a physical matter” and “substantially limiting as a behavioral matter.”<sup>418</sup> The dissent noted that this distinction finds no basis in the statutory text and stated, “[t]here is no requirement that the impairment physically limit that life activity, nor is there any specification about how the impairment must substantially limit that activity.”<sup>419</sup> Neither is there any basis in the legislative history, nor in the implementing EEOC regulations for the distinction drawn by the majority.<sup>420</sup> The dissent concluded that “[t]he majority’s

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411. See *id.* at 181-83.

412. *Id.* at 181 (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508 (1989) (“[C]oncluding that the text is ambiguous . . . we seek guidance from legislative history. . . .”); *Torcasio v. Murray*, 57 F.3d 1340, 1353 (4th Cir. 1995) (finding the ADA’s textual definition of “disability” to be “unilluminating”)).

413. See *id.* (citing H.R. REP. NO. 101-485, pt. 2 at 51, *reprinted in* 1990 U.S.C.C.A.N. § 303, 333) (“It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments . . . . The term includes, however, such conditions, diseases, and infections as . . . infection with the Human Immunodeficiency Virus. . . .”). *Accord* S. REP. NO. 101-116 at 22 (1989).

414. *Id.* at 182 (citing 135 CONG. REC. S10768 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy)).

415. See *id.* at 182-83 (citing 29 C.F.R. § 1630.2(h)(1) (EEOC) (1999)).

416. See *id.* at 183.

417. See *id.* at 183-85 (citing the ADA, 42 U.S.C. § 12,102(2)(A) (1994); H.R. REP. NO. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. §§ 303, 304; EEOC regulations at 29 C.F.R. § 1630.2(C)).

418. *Id.* at 184.

419. *Id.*

420. See *id.* (citing 29 C.F.R. § 1630.2(j)(ii)).

distinction goes against common sense. The majority claims that 'as a physical matter, nothing inherent in the virus substantially limits procreation or intimate sexual relations.'<sup>421</sup> The dissent maintained that contrary to the view of the majority "[i]t is HIV's physical effects, however, upon procreation and intimate sexual relations that make it substantially limiting. An individual with HIV stands a significant chance of infecting others if he engages in these activities, and this prospect of spreading the disease is a substantial impairment."<sup>422</sup>

The dissent also came to a conclusion opposite of the majority on the issue of whether Runnebaum has presented enough evidence to support his claim of discrimination based on his "being regarded as having such an impairment."<sup>423</sup> The evidence cited by the dissent includes the opening of Runnebaum's AZT packages by bank employees, the reaction of Runnebaum's fellow bank employee upon learning of Runnebaum's infection, and the fact that the supervisor who fired Runnebaum was informed of Runnebaum's HIV infection before he was actually terminated.<sup>424</sup> The dissent concluded contrary to the majority, that when all the evidence is considered fully and all reasonable inferences are made in Runnebaum's favor "it becomes clear that there is a genuine factual issue about whether the bank considered Runnebaum to be disabled."<sup>425</sup> Moreover, the dissent concluded Runnebaum presented evidence that the employer knew of his HIV status and that the reasons given for his firing were pretextual.<sup>426</sup> The inescapable conclusion, according to the dissent, is that Runnebaum's evidence created an issue of material fact as to whether Runnebaum was the subject of disability discrimination because he was "regarded as" having a disability.<sup>427</sup>

If the view of the majority in *Runnebaum II* were to prevail, asymptomatic HIV-infected individuals would be precluded from claiming protection from discrimination under the American with Disabilities Act, the Rehabilitation Act of 1973, and other legislation using comparable terms of "disability," "impairment" and "substantially limiting one or more major life activities." For all practical purposes, the opinion of *Runnebaum II* set down a rule that individuals with asymptomatic HIV infection are per se not individuals with a disability. The approach taken in *Runnebaum II* relied on a theory of "plain meaning" interpretation that not only ignores the intent of Congress, the implementation by designated agencies under lawfully promulgated regulations, and a developed body of case law, but also employed a doubtful approach to language itself. The history of the ADA (and the Rehabilitation Act before it) belies any basis for claiming that the statute is to be interpreted by a "plain meaning" approach. The *Runnebaum II* majority's approach simply ignores the

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421. *Id.* at 185.

422. *Id.* (citing Kmiec Memorandum, *supra* note 385, at 405:1, 405:7).

423. *Id.* at 188.

424. *See id.* at 187-88.

425. *Id.* at 186.

426. *See id.* at 188.

427. *Id.* at 188-89.

issuance of regulations by an agency, the EEOC, designated in the statute by Congress to promulgate regulations providing guiding definitions for such statutory terms as "impairment," "major life activities," and "substantial limitation. If the *Runnebaum II* approach were to prevail, ADA protection of the disabled in the context of AIDS would likely be meaningless, since the physical impairment that the *Runnebaum II* court apparently required would likely be so sufficiently debilitating that the individual at that stage of HIV disease would not be otherwise qualified. The approach of the *Runnebaum II* majority clearly undermines the objectives of Congress to exercise a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities, including those with HIV infection.<sup>428</sup>

#### VIII. THE UNITED STATES SUPREME COURT FINDS ASYMPTOMATIC HIV INFECTION AN IMPAIRMENT THAT CAN SUBSTANTIALLY LIMIT MAJOR LIFE ACTIVITIES OF AN INDIVIDUAL

In *Bragdon v. Abbott*<sup>429</sup> the United States Supreme Court attempted to provide some guidance in determining the extent to which persons with AIDS and HIV infection are included within the group of persons who are protected from unjustified discrimination under the Americans with Disabilities Act.<sup>430</sup> This is the first case that the Supreme Court has heard involving AIDS or HIV-infection.<sup>431</sup> While the court seems to have set out a definitive statement that AIDS and HIV-infection, whether symptomatic or asymptomatic, constitute an "impairment" under the terms of the ADA, the Court was less clear on the ultimate question of "disability" protection because of its treatment of the requirement that an impairment "substantially limits major activities of such individuals." The Court clearly determined that AIDS and HIV infection are not per se disabilities.

The case arose in 1994 when Sidney Abbott, who knew that she had been infected with HIV for at least nine years but remained asymptomatic, went to the office of her dentist Randon Bragdon for a scheduled dental appointment.<sup>432</sup> After Abbott disclosed her HIV infection on a registration form, the dentist examined her teeth and diagnosed a cavity. The dentist then informed the patient of his policy against filling cavities of HIV-infected patients in his office. However, the dentist offered to perform the work on Abbott's cavity at a hospital with no added fee, although Abbott would be required to pay the hospital for any charge for use of its facilities. Abbott refused Bragdon's offer and brought suit

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428. 42 U.S.C. § 12,101(B)(1) (1994).

429. 524 U.S. 624 (1998).

430. See *id.*

431. See Michael Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALA. L. REV. 897 (1998).

432. See *Bragdon*, 524 U.S. at 628.

against him under Title III of the ADA,<sup>433</sup> and the Maine Human Rights Act (MHRA),<sup>434</sup> which was not addressed by the Supreme Court.<sup>435</sup>

The federal district court, considering motions for summary judgment filed by both parties, primarily addressed the question of applicability of Title III of the ADA, although it found that the defendants conduct violated both the ADA and the MHRA.<sup>436</sup> Under Title III of the ADA, a place of public accommodation may not discriminate against an individual on the basis of disability in the full and equal enjoyment of services.<sup>437</sup> However, places of public accommodation may deny full and equal services to an individual who poses a direct threat to others.<sup>438</sup> Accordingly, the district court found it was faced with a three step analysis: (1) whether the dentist's office constituted a place of public accommodation; (2) whether the plaintiff has a disability within the terms of the ADA; and (3) whether the requested treatment in the dentist's office does not pose a direct threat to the health or safety of others.<sup>439</sup> The court's discussion focused on the latter two issues since the defendant did not dispute that his office was a place of public accommodation; moreover, the court found that the statutory language and interpretative regulations issued by the Department of Justice, the agency designated in the statute, provide authority for treating the professional office of a health care provider as a place of public accommodation.<sup>440</sup> The defendant challenged plaintiff's claim with regard to her disability status on the ground that: (1) asymptomatic HIV does not constitute a per se disability, and (2) the plaintiff did not present evidence that her asymptomatic HIV infection substantially limits any major life activity.<sup>441</sup>

The district court recognized that the ADA does not expressly refer to AIDS or HIV infection within the language of the statute, nor does the statute specifically refer to any other disease or condition as a per se disability.<sup>442</sup> In order to determine the applicability of the ADA to a specific disease or condition, the court recognized the need to apply the regulations promulgated by the agency which had been delegated authority by Congress under a provision of the statute, to determine whether an individual with HIV infection has an impairment that substantially limits a major life activity.<sup>443</sup> The court concluded that

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433. 42 U.S.C. § 12,182(a).

434. ME. REV. STAT. ANN. tit. 5, § 4592(1) (West 1989).

435. See *Bragdon*, 524 U.S. at 629 ("The state law claims are not before us.").

436. See *Abbott v. Bragdon*, 912 F. Supp. 580, 596 (D. Me. 1995) (concluding that defendant's conduct violated the ADA, 42 U.S.C. § 12,182(b)(2)(A)(i) and the Maine Human Rights Act, ME. REV. STAT. ANN. tit. 5, § 4592(1)), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *and rev'd in part*, 524 U.S. 624 (1998).

437. See *id.* at 584-85 (construing 42 U.S.C. § 12,182(2)).

438. See *id.* at 585 (construing 42 U.S.C. § 12,182(b)(3)).

439. See *id.*

440. See *id.* at 585 n.1 (citing 28 C.F.R. § 36.104 (1996)).

441. See *id.* at 585.

442. See *id.*

443. See *id.*

asymptomatic HIV infection does constitute an impairment within the meaning of the ADA based on (1) the interpretative guidelines provided by the agency designated by statute, i.e., the Department of Justice,<sup>444</sup> and (2) a significant body of judicial opinions that had reached the conclusion that HIV infection constitutes a physical impairment.<sup>445</sup> The court did not find it necessary to make an independent inquiry into the physical effects of HIV infection during the asymptomatic stage nor to consider the medical side effects of asymptomatic HIV infection treatment.

However, the district court refused to follow other courts that assumed that since the interpretative guidelines, promulgated by the D.O.J., included HIV among physical or mental impairments, the plaintiff was disabled for purposes of the ADA.<sup>446</sup> Instead the court felt constrained to inquire whether the plaintiff's asymptomatic HIV infection substantially limited one or more of her major life activities.<sup>447</sup> The district court accepted the plaintiff's claim that her asymptomatic HIV infection substantially limited her reproductive activity because of potential infection of an offspring, and because of detrimental health consequences to her from carrying out any pregnancy.<sup>448</sup> The court found reproduction to be among the most fundamental of human activities.<sup>449</sup> Although the court recognized that the relevant agency guidelines were "somewhat murky" on what was a major life activity,<sup>450</sup> the court concluded that the language of the ADA employing the term "major life activity,"<sup>451</sup> and the weight of judicial authority that had considered the issue recognizing reproduction as constituting a major life activity,<sup>452</sup> persuaded the court that "reproduction constitutes a major life activity for the purposes of the ADA."<sup>453</sup>

The court specifically rejected a number of counter arguments. Specifically the court rejected the argument that asymptomatic HIV infection did not physically prevent reproduction the way that infertility would.<sup>454</sup> Citing the language of the statute requiring an impairment that "substantially" limits a

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444. *See id.* (citing 28 C.F.R. § 36.104).

445. *See id.*

446. *See id.* at 585 n.2 (citing *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995)).

447. *See id.*

448. *See id.* at 585-86.

449. *See id.* at 586.

450. *Id.* (citing 28 C.F.R. § 36.104 (1996); noting *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (finding reproduction does not constitute a major life activity for the purposes of the ADA, reasoning that one does not engage in reproduction with the same frequency as walking, seeing, speaking, hearing, learning and working)).

451. *Id.* (citing *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994)).

452. *See id.* (citing *Erickson v. Northeastern Ill. Univ.*, 911 F. Supp. 316, 321 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994); *Kohn Nast & Graf, P.C.*, 862 F. Supp. at 1320-21; *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990)).

453. *Id.*

454. *See id.* at 586-87.



major life activity, the court concluded that "the statute does not contemplate a complete inability of that individual to engage in a particular major life activity."<sup>455</sup> The court found three features of human reproduction that were limited by the fact a woman is HIV infected including: (1) further danger to a mother's immune system resulting from pregnancy; (2) risk of infecting a child during pregnancy, through child birth, or through breast feeding; (3) or fear of being unable to care for the child beyond the act of conception and period of gestation.<sup>456</sup>

While the issue of other major life activities was raised, including limitations on the intimate sex life of an asymptomatic HIV-infected individual, the court declined to consider this issue because no evidence was presented on the matter, and because, in the court's view, the statutory language of the ADA requires "an individual determination of substantial limitation."<sup>457</sup> This view, of course, leaves uncertain the extent of protection provided by the ADA to asymptomatic HIV-infected persons, an issue that remains even after the issuance of the Supreme Court's opinion in the case.

Concluding that Abbott was disabled for purposes of Title III of the ADA, the district court undertook the determination of whether treating Abbott in the dentist's office posed a direct threat to the health and safety of others.<sup>458</sup> The plaintiff provided the testimony of an expert witness to establish that implementation of Centers for Disease Control (CDC) recommended precautionary measures eliminated any significant risk that in-office treatment would otherwise pose.<sup>459</sup> The defendant maintained that significant risk was established by: (1) the obviousness of risk in filling a cavity through the use of a needle to inject anesthetic creates risk of transmission through percutaneous needle stick injury, and drilling of the decayed cavity creates risk of transmission through spattering and misting of blood and blood saliva;<sup>460</sup> (2) by the report of forty-two documented cases of health care workers who have suffered occupational transmission of HIV and a report that six percent of all infected health care workers (as compared to four percent of the general public) do not have identified risk factors for infection;<sup>461</sup> and (3) by a line of case law in which courts have held the suspension or termination of infected health care workers does not constitute discrimination under Title III.<sup>462</sup>

Nevertheless, the court found the defendant's arguments unconvincing, reasoning that they either involved speculation, or relied on case law that was

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455. *Id.* at 587 (construing 42 U.S.C. § 12,102(2)(A) (1994)); *see also id.* at 587 n.5.

456. *See id.* (citing plaintiff's deposition).

457. *Id.* at 586 n.4.

458. *See id.* at 587 (construing 42 U.S.C. § 12,182(b)(3)).

459. *See id.* at 587-88 (citing CDC, RECOMMENDED INFECTION—CONTROL PRACTICES FOR DENTISTRY (1993)).

460. *See id.* at 588.

461. *See id.*

462. *See id.* at 589-90.



inapposite.<sup>463</sup> The court concluded that the defendant did not meet the requirements for summary judgment by providing evidence or judicial authority that supported the conclusion that treatment of the plaintiff in his office constituted a direct threat to the health and safety of others.<sup>464</sup> The court concluded that the plaintiff had refuted defendant's speculative evidence with the testimony of a reasonable medical official, in this case an employee of the CDC whose testimony supported the claim that treatment could be rendered to Abbott in the dentist's office without any direct threat to the health or safety of Bragdon and others.<sup>465</sup> The district court granted summary judgment for the plaintiff and enjoined the defendant from refusing to provide treatment in his office to individuals infected with HIV solely on the basis of their HIV positive status.<sup>466</sup>

The United States Court of Appeals for the First Circuit affirmed the district court's grant of summary judgment on Abbott's claim of violation of the public accommodation title of the ADA based on the defendant dentist's refusal to treat her because she was HIV positive.<sup>467</sup> The court of appeals agreed that Abbott was a disabled individual within the purview of the ADA, and that providing her care would not have posed a direct threat to the health or safety of others.<sup>468</sup>

While the court of appeals recognized the ADA was intended to send "a clear message to those who operate places of public accommodation [that] you may not discriminate against individuals in the full and equal enjoyment of services on the basis of a disability,"<sup>469</sup> the court recognized that it was constrained by the terms of the statute to first determine those who are qualified for protection against discrimination with reference to the criteria of "disability." The court made it clear that the "question is first and foremost a question of statutory construction."<sup>470</sup>

Following the traditional approach to statutory interpretation the court began "with the words of the statute."<sup>471</sup> Citing the three-prong definition of disability in the ADA, the court determined that it was required to determine whether Abbott had a disability by finding whether she has (1) a physical or mental impairment; (2) whether the impairment adversely affected a major life activity; and (3) whether the impairment substantially limited her ability to engage in the particular activity.<sup>472</sup>

The court of appeals easily found the existence of an impairment, concluding

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463. *See id.*

464. *See id.* at 591.

465. *See id.*

466. *See id.* at 596.

467. *See Abbott v. Bragdon*, 107 F.3d 934, 934-37 (1st Cir. 1997), *rev'd in part*, 524 U.S. 624 (1998).

468. *See id.* at 937.

469. *Id.* at 938 (citing 42 U.S.C. § 12,182(2) (1994)).

470. *Id.* (citing *Strickland v. Commissioner, Me. Dep't of Human Serv.*, 96 F.3d 542, 545 (1st Cir. 1996)).

471. *Id.* (citing *United States v. Gibbens*, 25 F.3d 28, 33 (1st Cir. 1994)).

472. *See id.* at 938-39.

that implementing the relevant agency regulations and the existing body of judicial authority established that "HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA."<sup>473</sup>

The court of appeals found the issue of "major life activity" more problematic. It was noted that the statute does not define the terms at issue, and the existing case law was divergent on exactly what constitutes a major life activity.<sup>474</sup> While viewing the question as "very close," the court of appeals concluded that "[r]eproduction (and the bundle of activities that it encompasses) constitutes a major life activity because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence."<sup>475</sup> While the court repeatedly spoke in terms of reproductive activity, the court took the view that reproduction is a multifaceted activity including the "ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations."<sup>476</sup>

Unlike the Fourth Circuit in *Runnebaum II*, which took a plain meaning approach to statutory instruction, the First Circuit approached the process of construing the meaning of the terms "major life activities" in the context of the statute with reference to prior use of the terms by Congress, and by examining the construction given by implementing agencies. The court approached the process as a sophisticated multi-step process. The first step taken by the court involved consideration of the ordinary meaning of the term:

- (1) Because the term "major life activities" is not defined in the enactment, we are obliged to construe it in accordance with its natural (that is, ordinary) meaning. The Court has looked to familiar dictionary definitions in similar situations. Following that model here lends support to the classification of reproduction as a major life activity. The plain meaning of the word "major" denotes comparative importance. These definitions strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric is its significance—and reproduction, which is both the source of all life and one of life's most important activities, easily qualifies

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473. *Id.* at 939 (citing 28 C.F.R. § 36.104 (1996)). The court mistakenly attributed these regulations to the EEOC; however, these regulations were promulgated by the delegated agency under Title III., the DOJ and *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994).

474. *See Abbott*, 107 F.3d at 939 (comparing *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996) (finding that reproduction is a major life activity); *Erickson v. Board of Governors of State Colleges*, 911 F. Supp. 316, 323 (N.D. Ill. 1995); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) with *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that reproduction is not a major life activity); *Zatarin v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995)).

475. *Id.* at 941.

476. *Id.* at 939.

under that criterion.<sup>477</sup>

Second, the court looked to past Congressional usage and the context within which Congress chose the terms being construed:

- (2) Congress lifted the term “major life activities” from the Rehabilitation Act of 1973, which used it in defining an “individual with handicaps.” In that milieu the term was accorded “a broad definition, one not limited to so called ‘traditional handicaps.’” In transplanting this combination of words from the soil of the Rehabilitation Act to that of the ADA, Congress specifically directed retention of the original meaning. Had Congress sought to confine the definition of disability narrowly, it surely would have written new, more restrictive language instead of borrowing a descriptive phrase notable for its breadth. It would be wholly inconsistent with this history to hold that Congress did not envision reproduction as a major life activity.<sup>478</sup>

Third, the court of appeals considered highly relevant the regulations and interpretive guidance provided by the administrative agency that was delegated authority by Congress to promulgate such regulations:

- (3) [W]e are guided by the regulations, which define “major life activities” to mean . . . functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. As the regulation itself clearly indicates, this enumeration is not meant to be exclusive, and reproduction—one of the most natural of endeavors—fits comfortably within this sweep. Furthermore, the portion of the regulations which defines physical impairments to include physiological disorders affecting the reproductive system, militates in favor of the same outcome. From the scope of the latter regulation, we deduce that its drafters considered reproduction to be a major life activity—otherwise, including reproductive disorders among the regulation’s roster of physical impairments would not have made much sense.<sup>479</sup>

Fourth, the court of appeals undertook an effort to determine the intent of Congress when it enacted the ADA using the statutory language at issue:

- (4) [O]ur mission in cases of statutory construction is to discern the

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477. *Id.* at 939-40 (citations omitted). Among the authorities cited are two dictionaries, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1084 (3d ed. 1992) (defining “major” as “greater than others in importance or rank”), and WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, 718 (1989) (defining “major” as “greater in dignity, rank, importance, or interest”).

478. *Abbott*, 107 F.3d at 940 (citations omitted).

479. *Id.* (citing 28 C.F.R. § 36.104 (1996); 45 C.F.R. § 84.3(j)(2)(ii) (a regulation implementing the Rehabilitation Act of 1973)).

legislature's intent. The result that we reach here comports with evidence in the legislative archives that Congress deemed HIV-infected individuals to be disabled under the ADA. Moreover, the ADA's precursor, the Rehabilitation Act, had been construed by the Department of Justice (DOJ) to protect persons infected with HIV from discrimination; in enacting the ADA, Congress endorsed the DOJ's view, noting that "a person infected with [HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relations."<sup>480</sup>

This approach to statutory language cannot be faulted for failure to give due deference to the actual wording of the statute. Nevertheless, rather than assuming that words have meaning in the abstract, the court of appeals approach considers ordinary usage as establishing the parameters for meaning, but not sufficient for establishing the actual meaning. The context in which the use of the words occurs is stressed, along with the interpretive guidance provided by the agency delegated authority to promulgate supporting regulations. This approach is certainly more likely to reach an understanding of the language of a statute as intended by the drafters of the legislation, than one that assumes words have some meaning without reference to context or usage.

The court of appeals considered and rejected a number of arguments that would militate against recognition of reproduction as a major life activity including: (1) the assertion that reproduction represents a lifestyle choice, and an activity in which many choose not to engage;<sup>481</sup> and (2) the claim that "reproduction" is to be distinguished from such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working based on the frequency of performance.<sup>482</sup> The court of appeals, on the contrary, finds "[t]here is no evidence that Congress intended either frequency or universality to operate as a restriction on the definition of 'major life activities.'"<sup>483</sup> Similarly, the court noted that the assertion that reproduction is a life style choice is without merit because voluntary restraint in no way denies a life activity its significance. As the court notes "[s]peaking is undoubtedly a major life activity, but there are those (say, monks who have taken vows of silence) who choose to eschew it."<sup>484</sup>

While the court of appeals does not reach a dispositive position, it does consider whether it is necessary for a particular individual with an impairment to show that he or she would otherwise engage in the major life activity that is

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480. *Id.* at 942-43 (citing H.R. REP. NO. 101-485, at 28 n.18 (1990), *reprinted in* 1990 U.S.C.C.A.N. § 445).

481. *See id.* at 940.

482. *Id.*

483. *Id.* at 941.

484. *Id.*

substantially limited by the impairment.<sup>485</sup> The court of appeals suggests that the individualized finding that the impairment substantially limits a major life activity is not a particularized determination.<sup>486</sup> According to the court of appeals, “[t]he need for this case-by-case analysis of disability does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity.”<sup>487</sup> The court suggests “it might be enough for a court to consider only whether a given impairment substantially limits a particular plaintiff without considering whether the activity is of particular import to her.”<sup>488</sup> Since the instant case took the form of a grant of summary judgment, the court of appeals assumed arguments that Abbott needed to establish a nexus between her impairment and a major life activity in which she would otherwise engage.<sup>489</sup> The court of appeals concluded that the record sufficiently established that Abbott’s HIV infection materially affected her decision not to engage in reproductive activity.<sup>490</sup>

Finally, the court rejected the argument that Abbott faced a relatively small chance of infecting any child she bore because of anti-viral therapy.<sup>491</sup> According to the defendant, an HIV-infected mother faced a twenty-five percent risk of transmitting HIV to her child if she were not treated with an anti-viral therapy. However, with anti-viral therapy employing AZT, the risk of transmission can be reduced to as low as eight percent.<sup>492</sup> The court, however, rejected the argument that the reduction of risk of transmission meant that HIV-infection provided no impediment to reproductive activity. Instead the court concluded that an eight percent risk of passing HIV to an offspring continued to provide a substantial barrier to reproductive activity by HIV-infected mothers.<sup>493</sup>

The conclusion that Abbott’s HIV positive status constituted a physical impairment that substantially interfered with her major life activity of reproduction resulted in a finding that she was disabled within the meaning of the ADA,<sup>494</sup> the court of appeals then turned its attention to the question of whether Abbott posed a “direct threat” if she were to be treated in a dentist’s office.<sup>495</sup> The answer to this question, according to the court, must be based on current medical knowledge or the best available medical evidence.<sup>496</sup> The court found the district court’s reliance on expert testimony insufficient as the basis for its determination that Abbott’s HIV infection did not pose a direct threat to others

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485. *See id.*

486. *See id.*

487. *Id.*

488. *Id.*

489. *See id.* at 941-42.

490. *See id.*

491. *See id.* at 942.

492. *See id.*

493. *See id.*

494. *See id.* at 948.

495. *Id.* at 943.

496. *See id.* at 944 (citing 28 C.F.R. § 36.208(c) (1996)).

if she were to receive dental treatment in Bragdon's office.<sup>497</sup> Instead, the court found the CDC recommendation for "universal precautions" and the recommendations of the American Dental Association for safe dental procedures provided a sufficient basis for determining that Abbott could be treated in the dentist's office without providing a direct threat to the health or safety of others.<sup>498</sup> The court indicated a sensitivity to the safety concerns of health care workers like Dr. Bragdon,<sup>499</sup> suggesting a need for courts to continue to carefully examine the evidence with regard to the danger posed by a contagious or infectious disease such as HIV. The court concluded "[w]e also recognize that cases of this kind are necessarily fact-sensitive; had the patient required more invasive treatment or had the dentist proffered stronger evidence of direct threat, the result may well have differed."<sup>500</sup> The court came to the principled position that discrimination cannot be justified on the mere existence of HIV infection; instead, disparate treatment of those infected with HIV must be based on scientific and medical evidence that establishes that the HIV-infected person poses a direct threat to the health or safety of others under Title III of the ADA (and presumably may not be discriminated against in employment if otherwise qualified under Title I of the ADA).<sup>501</sup>

In *Bragdon v. Abbott*, the United States Supreme Court in a 5-4 decision affirmed the court of appeals finding that a person with asymptomatic HIV infection is a disabled person within the purview of the ADA, but by an effectively unanimous agreement the Court vacated and remanded the judgment of the issue of whether Abbott's HIV-infection posed a direct threat to the health and safety of others in the context of routine treatment in a dentist's office.<sup>502</sup>

Writing for the majority, Justice Kennedy applied a three-step process to determine whether Abbott's infection constituted a disability under the ADA: (1) whether asymptomatic HIV infection constitutes a physical impairment; (2) whether reproduction and child bearing constitute major life activities; and (3) whether asymptomatic HIV infection substantially limits the activities of reproduction and child bearing.<sup>503</sup>

Eschewing a plain language analysis, in an effort to determine the facial meaning of the ADA, the Court's approach to statutory construction placed heavy reliance on the interpretation's given by the DOJ, and by the prior interpretation of previously enacted statutes to which Congress referred in enacting the ADA, most significantly the Rehabilitation Act of 1973.<sup>504</sup> The

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497. See *id.* at 945.

498. *Id.* at 945-46 (citing CDC, *supra* note 459; AMERICAN DENTAL ASSOCIATION, POLICY ON AIDS, HIV INFECTION AND THE PRACTICE OF DENTISTRY (1991)).

499. See *id.* at 949.

500. *Id.*

501. See *id.*

502. See *Bragdon v. Abbott*, 524 U.S. 624 (1998).

503. See *id.* at 631 (applying 42 U.S.C. § 12,102(2)(A) (1994)).

504. See *id.* (citing the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1994) and the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(1) (1989)).



majority noted the fact that the actual language of the ADA was drawn from the Rehabilitation Act. According to the Court, this gave rise to an implication that the terms were to be construed in accordance with the pre-existing interpretations.<sup>505</sup> Moreover, the majority noted the explicit direction of Congress to courts that, except as otherwise provided in the Americans with Disabilities Act, the statute is not to "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title."<sup>506</sup>

The majority determined that the first regulations addressing the question of what constitutes a "physical impairment" were issued in 1977 by the Department of Health, Education and Welfare (HEW).<sup>507</sup> HEW was the designated agency responsible for coordinating the implementation and enforcement of section 504 of the Rehabilitation Act.<sup>508</sup> The HEW regulations defined "physical or mental impairment" to include "any physiological disorder . . . affecting one or more of the following body systems [including] . . . hemic [blood] and lymphatic . . ."<sup>509</sup> The majority noted that HEW did not provide a list of specific disorders constituting a physical or mental impairment because of concern that any specific enumeration of disease conditions might not be comprehensive.<sup>510</sup> The Court also noted that HIV could not be included in a list of specific disorders constituting physical impairments under section 504 since the causal agent of AIDS was not discovered until 1983.<sup>511</sup> In 1980, responsibility for implementation and enforcement of section 504 was transferred to the DOJ.<sup>512</sup> The agency "adopted verbatim the HEW definition of physical impairment" in its regulations that remain in force today.<sup>513</sup>

Unlike the district court or the First Circuit Court of Appeals in their earlier consideration of the case, the majority undertook an extensive analysis of the medical and scientific understanding of HIV infection as part of its analysis to determine whether HIV infection constitutes a physical impairment under the ADA. The majority adopted the view that HIV infection is not a series of discrete conditions, but it is a disease following a set course of development.<sup>514</sup> The Court noted that at the initial or primary stage of HIV infection, the so-called "acute" stage, the virus concentrates in the blood and immediately attacks the

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505. See *id.* (citing *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 434-38 (1986); *Commissioner v. Estate of Noel*, 380 U.S. 678, 681-82 (1965); *ICC v. Parker*, 326 U.S. 60, 65 (1945)).

506. *Id.* at 631-32 (quoting 42 U.S.C. § 12,201(a)).

507. *Id.* at 632.

508. See *id.* (citing Exec. Order No. 11914, 3 C.F.R. § 117 (1980)).

509. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(i) (1997)).

510. See *id.* at 633 (citing 42 Fed. Reg. 22,685, *reprinted in* 45 C.F.R. § at 84, App. A., p. 334).

511. See *id.*

512. See *id.* (citing Exec. Order No. 12250, 3 C.F.R. § 298 (1981)).

513. *Id.* (citing 28 C.F.R. § 41.31(b)(1) (1997)).

514. See *id.* ("The diseases follows a predictable and, as of today, an unattenable course.").



person's immune system.<sup>515</sup> Primary HIV infection produces a significant decline in white blood cells or CD4+ cells.<sup>516</sup> The Court emphasized that HIV infection does not involve a latency or incubation period. With infection, the individual often experiences "[m]ononucleosis-like symptoms, often . . . accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders."<sup>517</sup> These symptoms abate in two to three weeks.<sup>518</sup> HIV antibodies can be detected in the blood stream within three weeks, and the virus can be detected in the blood stream within ten weeks.<sup>519</sup>

When the initial symptoms subside, the person is diagnosed as being in the "asymptomatic" phase. The majority made clear, however, its opinion that there are significant effects of HIV infection that are manifest in the infected individual.<sup>520</sup> The Court was emphatic in its understanding of the persistent physiological effects of HIV infection. According to the Court "[a]fter the symptoms associated with the initial state subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections."<sup>521</sup> The Court notes that a person passing through the so-called asymptomatic phase may appear to have reduced observable physical manifestations of infection as a result of increased viral migration throughout the circulatory system and an increased viral concentration in the lymph nodes with corresponding decrease CD4+ count.<sup>522</sup>

The Court notes that a person is diagnosed with AIDS when the CD4+ count drops below 200 cells/mm<sup>3</sup> of blood or when CD4+ cells comprises less than fourteen percent of the body's total lymphocytes.<sup>523</sup> It is at this stage that the HIV-infected person is likely to contract various opportunistic infections and diseases such as pneumocystis carinii pneumonic, Kaposi's sarcoma, and non-Hodgkin's lymphoma.<sup>524</sup>

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515. *Id.*

516. *See id.* at 634-35.

517. *Id.* at 635 (citations omitted).

518. *See id.*

519. *See id.*

520. *See id.*

521. *Id.*

522. *See id.* at 636.

523. *See id.* (citing HHS/CDC, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 MMWR, Rep. No. RR-17 (Dec. 18, 1972); OSMOND, AIDS KNOWLEDGE BASE 1.1-2 (P. Cohen et al. eds., 2d ed. 1994); Saag, *supra* note 11, at 207; Ward et al., *Current Trends in the Epidemiology of HIV/AIDS in THE MEDICAL MANAGEMENT of AIDS* 3 (Merle A. Sande & Paul A. Volberding eds., 5th ed. 1997)).

524. *See id.* (citing P. Cohen & P. Volberding, *Clinical Spectrum of HIV Disease*, in AIDS KNOWLEDGE BASE 4.1-7 (1994); Saag, *supra* note 11, at 207-09).

On the basis of the statutory criteria for an ADA impairment, the majority concluded asymptomatic HIV infection qualifies as a statutory impairment. According to the majority, "[i]n light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold it is an impairment from the moment of its infection."<sup>525</sup> The majority reasoned that HIV infection is a disability under the ADA because HIV infection results in "immediate abnormalities" in the composition of an individual's blood and significantly depreciates a person's white cell count and dramatically affects the persons lymph nodes.<sup>526</sup> Further, the majority determined that HIV infection must be considered a physiological disorder because of its "constant and detrimental effect on the infected person's hemic [blood] and lymphatic systems."<sup>527</sup> The majority's holding results in a finding that HIV infection, whether asymptomatic or symptomatic, is a per se impairment within the terms of the ADA.

Of course, a finding of a per se impairment does not necessarily lead to the conclusion that a person with asymptomatic HIV infection is disabled. A showing must be made that the impairment substantially limits a major life activity of the infected individual.<sup>528</sup> It is important to note that although the Court undertakes an analysis of whether reproduction and child bearing constitute major life activities, the majority makes clear that there are likely a wide range of other significant major life activities whose exercise is compromised by HIV infection. The Court nevertheless limited its discussion to those activities that were in the record of the case before the Court. The Court stated unequivocally:

Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of amici make arguments about HIV's profound impact on almost ever phase of the infected person's life. In light of these submissions, it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.<sup>529</sup>

This observation becomes important if subsequent litigation results in judicial authority requiring an individualized determination of whether the impairment of HIV infection results in a substantial limitation on the litigant's ability to engage in the activity of procreation. Gay men, menopausal women, men who have had a vasectomy, women who have had a hysterectomy, persons who are otherwise sterile, or children may be all faced with the need to identify other

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525. *Id.* at 637.

526. *Id.*

527. *Id.*

528. *See id.*

529. *Id.* (citing brief of respondents and amici).

major life activity in order to establish that they are disabled within the terms of the ADA.

In determining whether reproduction constitutes a major life activity, the majority cited the Court of Appeals' discussion of the term "major"<sup>530</sup> and concluded that human reproduction, and the closely related activities of child rearing, constitute major life activities in those who undertake them because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."<sup>531</sup> The majority found nothing in the statute to support the petitioner's argument that Congress intended the ADA only to cover aspects of a person's life which have "a public, economic, or daily character."<sup>532</sup> Instead, the Court found that the regulations promulgated to implement the ADA and its predecessor suggest the contrary.<sup>533</sup>

Similarly, the Court found no merit to the claim that HIV infection does not substantially impede a woman from engaging in reproductive activity. The Court cited a number of aspects of HIV infection that significantly interfered with an HIV-infected individual's ability to engage in reproductive activity including: (1) a significant risk of infecting a sexual partner (sexual transmission of HIV),<sup>534</sup> (2) a significant risk of infecting a child during gestation or childbirth (perinatal transmission);<sup>535</sup> (3) added costs of long term health care for the child that must be examined and perhaps treated for HIV infection;<sup>536</sup> and (4) possible violation of state statutes forbidding persons with HIV infection from having sex with others, regardless of consent.<sup>537</sup>

The Court rejected the assertion that an HIV-infected woman could reduce the likelihood of giving birth to an infected infant from twenty-five percent to eight percent by the use of anti-retroviral therapy, therefore reducing any limitation on their reproductive activity resulting from their HIV infection. The

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530. *Id.* at 638 (citing *Abbott v. Bragdon*, 107 F.3d 934, 939, 940 (1997)).

531. *Id.*

532. *Id.*

533. *See id.* at 638-39.

534. *See id.* at 639-40 (citing Osmond & Padian, *Sexual Transmission of HIV*, in AIDS KNOWLEDGE BASE 1.9-8, 2nd tbl. 2 (P. Cohen et al. eds., 2d ed. 1994) (20% of male partners of women with HIV becomes HIV-positive themselves); Haverkos & Battjes, *Female-to-Male Transmission of HIV*, 268 JAMA 1855-56, tbl. (1992) (25% risk of female to male transmission)).

535. *See id.* at 640 (citing STRAPANS & FEINBERG, MEDICAL MANAGEMENT OF AIDS 32 (studio reps 13% to 45% risk of infection, with average of approximately 25%); Connor et al., *supra* note 364, at 1173-76 (placing risk at 25.5%); *Report of a Consumer Workshop, Maternal Factors Involved in Mother-to-Child Transmission of HIV-1*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME, 1019-20 (1992) (collecting 13 studies placing risk between 14% and 40% with most studies falling within the 25% to 30%)).

536. *See id.* at 641.

537. *See id.* (citing IOWA CODE § 139.1 (1997); MD. CODE ANN., HEALTH-GEN. I § 18-601.1(2) (1994); MONT. CODE ANN. §§ 50-18-112 (1997); N.D. CENT. CODE § 12.1-20-17 (1997); UTAH CODE ANN. § 26-6-3.5(3) (Supp. 1997); § 26-6-5 (1995); WASH. REV. CODE § 9A.36.011(1)(b) (Supp. 1998)).

Court found that even an eight percent possibility of transmitting HIV to an offspring is to be regarded as significant.<sup>538</sup> It is clear that the statistical other concerns identified by the Court were a significant basis for its decision; however, from the respondent's revelation that her HIV infection controlled her decision not to have a child was "unchallenged."<sup>539</sup>

Just as the Court found support for its view of the meaning of "impairment" in the legislative history, implementing regulations of the ADA, and Rehabilitation Act of 1973, the Court found similar support for its view that the disability provision of the ADA was meant to include individuals with asymptomatic HIV infection.<sup>540</sup> The Court first looked to interpretations of the Rehabilitation Act of 1973 that extended coverage to those with HIV infection. The Court began by citing the 1988 Memorandum opinion issued by the Office of Legal Counsel of the DOJ concluding that the Rehabilitation Act "protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program."<sup>541</sup> The Court also noted that every agency that addressed the problem before enactment of the ADA reached the conclusion that those with HIV infection were handicapped<sup>542</sup> and that existing agencies addressing the issue since enactment of the ADA have adhered to the conclusion that HIV infection constitutes a handicap or disability.<sup>543</sup> Further the Court observed that every court that had addressed the issue of coverage under the Rehabilitation Act before the ADA was enacted in 1990 concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of handicap.<sup>544</sup>

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538. See *id.*

539. *Id.* (citations omitted).

540. *Id.* at 642.

541. *Id.* (quoting *Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals*, 12 OP. OFF. LEGAL COUNSEL 264, 264-65 (Sept. 27, 1998)).

542. See *id.* at 643 (citing FEDERAL CONTRACT COMPLIANCE MANUAL APP. 6D, 8 FEP MANUAL 405.352 (Dec. 23, 1998); *In re David Ritter*, No. 03890089, 1989 WL 609697, \*10 (EEOC Dec. 8, 1989)).

543. See *id.* (citations omitted).

544. See *id.* at 644 (citing *Doe v. Garrett*, 903 F.2d 1455, 1457 (11th Cir. 1990); *Baxter v. Belleville*, 720 F. Supp. 671, 679 (E.D. Pa. 1990) (Pennsylvania Human Relations Act)); *Ray v. Sch. Dist. of DeSoto County*, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1987); *District 27 Community Sch. Bd. v. Board of Ed. of New York*, 502 N.Y.S.2d 325, 335-37 (Sup. Ct. Queens Cty. 1986); see also cases finding HIV to be a handicap without distinguishing between symptomatic and asymptomatic: *Robertson v. Granite City Community Unit School District No. 9*, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1998); *Association of Relations and Friends of AIDS Patients v. Regulations and Permits Administration*, 740 F. Supp. 95, 103 (P.R. 1990) (Fair Housing Amendments Act); *Martinez ex rel. Martinez v. School Board of Hillsborough City*, 861 F.2d 1502-06 (11th Cir. 1988); *Chalk v. United States District Court*, 840 F.2d 701, 701-06 (9th Cir. 1988) *Doe v. Dalton Elementary School District No. 148*, 694 F. Supp. 440, 445-45 (N.D. Ill. 1988); *Local 1813, AFOE v. United States Department of State*, 662 F. Supp. 50, 54 (D.C. 1987).

The Court adopts a traditional maxim of statutory interpretation ignored by the Fourth Circuit in *Runnebaum II*, and not adequately stated by the First Circuit in its opinion in *Abbott v. Bragdon*, that needs to be emphasized in face of demands for plain language analysis which remains sensitive to legislative history. The Court clearly states “[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”<sup>545</sup> The majority maintains that if Congress had done nothing more than integrate the existing language of the Rehabilitation Act into the ADA, given the interpretation that language had been given, it would be evidence that Congress intended the ADA’s disability provision to include asymptomatic HIV infection.<sup>546</sup> The majority points out that Congress was well aware of the 1988 DOJ Memorandum opinion and, moreover, specifically endorsed the analysis and conclusions of the DOJ Memorandum in the House and Senate reports accompanying the ADA.<sup>547</sup> The Court also found significant that Congress had incorporated the same definition into its earlier enactment of the Fair Housing Act Amendments of 1988.<sup>548</sup> Moreover, it is noteworthy that the regulations promulgated in 1989 by the Department of Housing and Urban Development construed the Fair Housing Act as providing protection for persons with HIV infection.<sup>549</sup>

The Court also found persuasive the regulations promulgated by the DOJ, as the agency directed by Congress to issue implementing regulations for Title III,<sup>550</sup> including “HIV infection (symptomatic and asymptomatic)” in the list of disorders constituting a physical impairment.<sup>551</sup> Moreover, the Court noted that the DOJ in its *Title III Technical Assistance Manual*, concludes that persons with asymptomatic HIV infection fall within the ADA’s definition of disability.<sup>552</sup> The Court found similar authority in the regulations and guidance from other agencies involved in administration and enforcement of the ADA, including the EEOC and the Department of Transportation.<sup>553</sup>

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545. *Abbott*, 524 U.S. at 645 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-87 (1978)).

546. *See id.* at 644-45.

547. *See id.* at 645 (citing H.R. REP. 101-485, pt. 2, p. 52 (1990); H.R. REP. NO. 101-485, p. 2 at 28 n.18; S. REP. NO. 101-116, pp. 21-22 (1989) (all endorsing the conclusion of the DOJ Memorandum that HIV infection, whether symptomatic or asymptomatic, qualified as a handicap under the Rehabilitation Act of 1973)).

548. *See id.* (citing 42 U.S.C. § 3602(h)(1) (1994)).

549. *See id.* (citing 54 Fed. Reg. 3232, 3245 (1989) (codified at 24 C.F.R. § 100.201 (1997))).

550. *See id.* at 646 (citing 42 U.S.C. § 12,186(B) & (O) (1994 & Supp. III 1997)).

551. *Id.* (citing 28 C.F.R. § 36.104(1)(ii)).

552. *See id.* (citing U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, THE AMERICANS WITH DISABILITIES ACT; TITLE III TECHNICAL ASSISTANCE MANUAL 9 (Nov. 1992)).

553. *See id.* at 647 (citing 42 U.S.C. § 12,116 (1994) (authorizing EEOC to issue regulations under Title I); 42 U.S.C. § 12,134(2) (authorizing DOJ to issue regulations implementing public service provision of Title II, subtitle A); 42 U.S.C. §§ 12,149, 12,164, 12,186, 12,206(C) (1994 & Supp. III 1997) (authorizing Sec. of Trans. To issue regulations relevant provisions of Title II

Although *Abbott* was found to have a disability under the ADA, the Court recognized that she could be refused treatment in a dentist's office if her HIV infection "pose[d] a direct threat to the health and safety of others" that could not be "eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services [in the dentist's office]." <sup>554</sup> The Court assessed the possible risks from the point of view of providers of service, stressing that "the risk assessment must be based on medical or other objective evidence." <sup>555</sup> The Court recognized that a provider of services "belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." <sup>556</sup>

While the Court recognized that the views of public health authorities, such as the United States Public Health Services, CDC, and the National Institute of Health deserve special weight and authority, the Court maintained that the views of these agencies are not conclusive. <sup>557</sup> The majority concluded that the court of appeals was right to have rejected the trial court's total reliance on the affidavit of a CDC official, <sup>558</sup> but the majority also faulted the court of appeals for its reliance on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV. <sup>559</sup> The Court first faulted the Fourth Circuit for not recognizing the limited importance of the CDC guidelines, for in the Court's view "the Guidelines do not necessarily contain implicit assumptions conclusive of the point to be decided. The Guidelines set out CDC's recommendations that the universal precautions are the best way to combat the risk of HIV transmission. They do not assess the level of risk." <sup>560</sup> Similarly, the majority faulted the Fourth Circuit on its reliance on the Dental Association policy statement. The majority concluded it is not clear whether the Dental Association policy was based on an assessment of the dentist's ethical and professional duties rather than a scientific assessment of the risk faced by the dentist, which is the basis of the ADA's statutory concerns. <sup>561</sup> According to the Court "[e]fforts to clarify dentists' ethical obligations and to encourage dentists to treat patients with HIV infection with compassion may be commendable, but the question under the statute is one of statistical likelihood, not professional responsibility." <sup>562</sup> Neither did the Court find the deposition the petitioner placed

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and III)). These agencies concluded HIV infection is an ADA physical impairment under the ADA. See 28 C.F.R. § 35.104 (1)(iii) (1997); 49 C.F.R. § 37.3, 38.3 (1977); 56 Fed. Reg. 13,858 (1991).

554. *Abbott*, 524 U.S. at 648-49 (applying 42 U.S.C. § 12,182(B)(3) (1994). Cf. 42 U.S.C. §§ 12,111(3), 12,113(B)).

555. *Id.* at 649 (citing *School Bd. Of Nassau City v. Arline*, 480 U.S. 273, 288 (1987); 28 C.F.R. § 36.208(e) (1997)).

556. *Id.*

557. See *id.* at 650 (citing *Arline*, 480 U.S. at 288; 28 C.F.R. p. 36, App. B, p.626 (1977)).

558. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 945 n.7 (1997)).

559. See *id.* at 651 (citing *Abbott*, 107 F.3d at 945-46).

560. *Id.* at 651-52.

561. See *id.* at 652.

562. *Id.*



into the trial court record determinative evidence on the extent of the danger of airborne transmission of HIV in the setting of dental treatment using high-speed drills, nor were the reports of dental workers who had possible occupational transmission of HIV sufficient to establish the kind of risk showing required by the statute.<sup>563</sup> The Court found itself constrained on the question of risk by what it felt was an inadequate record. The Court pointed out that "we have not had briefs and arguments directed to the entire record."<sup>564</sup> The Court remanded the question of risk to the Court of Appeals to determine whether the petitioner had presented sufficient evidence to raise a triable issue of fact on the question of risk.<sup>565</sup>

Justice Stevens, joined by Justice Breyer, concurred with the majority stating that there was no doubt that the asymptomatic HIV infection of Abbott placed her within the category of ADA disability.<sup>566</sup> However, Justice Stevens expressed a preference for outright affirmance, without remand on the dire of threat because the respondent had failed to raise a triable issue of fact on the direct threat issue, and because the court of appeals' decision was based on the record.<sup>567</sup>

Justice Ginsberg filed a concurring opinion agreeing that the case should be remanded on the direct threat issue because it is wise to "[err] if at all, on the side of caution."<sup>568</sup> However, Justice Ginsberg indicated that she would have found Abbott disabled both under the actual disability prong of the ADA definition, and the "regarded as" standard.<sup>569</sup> Justice Ginsberg's opinion also suggested other major life activities might be cited by HIV infected individuals.<sup>570</sup> Justice Ginsberg observed "[t]he disease inevitably pervades life's choices: education, employment, family and financial undertakings. It affects the needs for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment."<sup>571</sup>

Justice O'Connor, concurring in the judgment and dissenting, in part, maintained that Abbott did not establish that her HIV infection substantially limited a major life activity.<sup>572</sup> Justice O'Connor found reproductive activity to be different in kind from the representative life activities set out in the applicable regulation that includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>573</sup> Moreover, Justice O'Connor concluded that the First Circuit failed to adequately determine

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563. *See id.* at 652-53.

564. *Id.* at 654.

565. *See id.* at 655.

566. *See id.* (Stevens, J., concurring).

567. *See id.*

568. *Id.* at 656 (Ginsberg, J., concurring).

569. *Id.*

570. *See id.*

571. *Id.*

572. *See id.* at 664 (O'Connor, J., concurring in part and dissenting in part).

573. *Id.* at 665.

whether Abbott's HIV infection posed a direct threat.<sup>574</sup>

Chief Justice Rehnquist filed a two part dissent, joined in the first part by Justices Scalia and Thomas, and joined in the second part by Justice O'Connor.<sup>575</sup> In the first part of his dissent the Chief Justice stressed the need for an "individualized" inquiry to determine whether an individual has a disability under the ADA since the disability determination must be made "with respect to an individual" and because the "major life activities" must be those "of such individual."<sup>576</sup>

The Chief Justice accepted for the sake of analysis that Abbott's asymptomatic HIV infection constituted an ADA impairment since it was not disputed by Bragdon.<sup>577</sup> However, on the issue of whether reproduction constituted a major life activity, the Chief Justice maintained the fact that being "important in a person's life" is not dispositive.<sup>578</sup> Rather, the Chief Justice maintained that the major life activities recognized in the relevant agency regulations required a certain regularity engagement.<sup>579</sup> According to the Chief Justice "[t]he common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child."<sup>580</sup>

The Chief Justice extended his argument that, even assuming reproduction was a major life activity, asymptomatic HIV infection would not substantially limit engagement in reproduction.<sup>581</sup> According to the Chief Justice "[t]he record before us leaves no doubt that those so infected are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity."<sup>582</sup> From the Chief Justice's point of view, asymptomatic HIV infection may give an infected person reasons for not engaging in reproduction, but HIV infection does not "physically" substantially lessen the ability of a person to engage in reproduction.<sup>583</sup> According to the Chief Justice, "[w]hile individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a 'limit' on one's own life activities."<sup>584</sup> Nor did the Chief Justice find the invocation of the statutory terms "substantially lessen" significant, since in his view there is no evidence that because of HIV infection Abbott has any less ability than others to

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574. *See id.*

575. *See id.* at 657 (Rehnquist, C.J., dissenting).

576. *Id.* (applying 42 U.S.C. §§ 12,102(2) and 12,102(3)(A) (1994)).

577. *See id.* at 658.

578. *Id.* at 660.

579. *See id.*

580. *Id.*

581. *See id.* at 660-61.

582. *Id.*

583. *Id.*

584. *Id.* at 661.

engage in reproductive activity "as a matter of mere physical ability."<sup>585</sup> The Chief Justice also did not look kindly on the assertion that Abbott's HIV infection would not permit her to complete the process of child rearing because of his reading of the word "limits" (which is limited to the present tense) and his view that child rearing necessarily looked to the future.<sup>586</sup>

The Chief Justice also found it significant that there was no evidence in the record that, prior to becoming infected with HIV, Abbott's major life activities included reproduction. According to the Chief Justice "[t]here is absolutely no evidence, that absent the HIV, respondent would have had or was even considering having children."<sup>587</sup> The Chief Justice concluded that given this evidence, Abbott does not meet the ADA's definition of "disability" because it requires that the major life activity at issue be "of such individual."<sup>588</sup> It should be recalled that even the *Runnebaum II* majority suggested it was not necessary to determine that the particular individual would otherwise engage in the major life activity which the ADA impairment substantially limited.<sup>589</sup> Also, it is important to note that the majority in *Bragdon* specifically concluded "[t]estimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged."<sup>590</sup> The spectre thus remains that it may be necessary for an asymptomatic HIV infected individual claiming disability protection under the ADA to establish that there is a particular recognized major life activity in which they would otherwise engage, but for his or her HIV infection.

Part II of the dissent established agreement with the majority's decision to remand the case on the issue of "direct threat" but expressed disagreement with the majority's grant of special weight and authority to the views of public health authorities such as the United States Public Health Service, CDC, and the National Institute of Health.<sup>591</sup> According to the Chief Justice "[i]n litigation between private parties originating in the federal courts, I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General)."<sup>592</sup> In the Chief Justice's view, expert opinions, including that of officials of the public health authority, "must stand on their own."<sup>593</sup> The Chief

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585. *Id.*

586. *Id.* (citing 42 U.S.C. § 12,102(2)(h) (1994) ("limits" (present tense) a major life activity)).

587. *Id.* at 659.

588. *Id.*

589. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170 (4th Cir. 1997) (en banc).

590. *Abbott*, 524 U.S. at 641 (citing *Abbott v. Bragdon*, 912 F. Supp. 580, 587 (D. Me. 1995); *Abbott v. Bragdon*, 107 F.3d 934, 942 (1997) ("Testimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged.")).

591. *Id.* at 661-63 (Rehnquist, C.J., dissenting).

592. *Id.* at 663.

593. *Id.*

Justice concluded that the petitioner presented more than enough evidence to avoid summary judgment on the direct threat question.

On remand in an opinion issued on December 20, 1998, the First Circuit Court of Appeals reaffirmed its conclusion that Bragdon violated the ADA by refusing to treat an HIV-positive dental patient in his office.<sup>594</sup> The three-judge panel concluded that Bragdon produced no legitimate medical or scientific evidence to show that providing routine, in-office dental care to an HIV-infected patient would subject him or others to any significant direct threat of contracting HIV infection.<sup>595</sup> The court maintained that Bragdon's claims regarding the risks of HIV transmission from patient to dentist, where there was compliance with CDC "universal precautions," were "too speculative" and "too tangential" to create a genuine issue of material fact.<sup>596</sup> The court of appeals panel viewed the 1993 CDC guidelines as "competent evidence" by a recognized public health authority that the provision of routine dental care of the type at issue in the litigation before the court could be provided without threat of infection to the dentist or assisting health care worker.<sup>597</sup> Moreover, the court noted that the brief submitted by the dental association confirmed that the organization's 1991 policy statement on the treatments of HIV-positive patients originated with the association's committee for scientific affairs, not its committee on ethics.<sup>598</sup> Nevertheless, the court issued a caveat recognizing that future medical or scientific evidence might provide a basis for a different conclusion on the issue of direct threat.<sup>599</sup> According to the court "[t]he state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision."<sup>600</sup> The consequence of this ruling is a final affirmation of the grant of summary judgment by the district court in 1995 enjoining Bragdon from refusing to provide in-office care to patients based solely on their HIV infection.

#### CONCLUSION: SOME REMAINING ISSUES

The issue of "direct threat" under Title III<sup>601</sup> and the issue of "otherwise qualified under Title I"<sup>602</sup> are fact specific and provide the basis for continuing litigation under the ADA, even with the effective ruling of the United States Supreme Court that HIV-infection is an ADA per se impairment.

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594. See *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

595. See *id.* at 90.

596. *Id.*

597. *Id.*

598. See *id.*

599. See *id.*

600. *Id.*

601. 42 U.S.C. § 12,182(b)(3) (1994).

602. *Id.* § 12,112(8).

The Court shed little light on what actually constitutes a direct threat to the health or safety of others. While the Court indicated that significant weight should be given to the policies and statements of the public health authorities such as the United States Public Health Services, the CDC and the National Institute of Health,<sup>603</sup> the Court provided no guidance for determining what constitutes a significant risk to others.

The question of what constitutes a "major life activity" will also likely continue to be litigated. Because of reference to "intimate sexual relations" in the 1988 DOJ Memorandum,<sup>604</sup> it is possible that a court considering the matter would reach the conclusion that "intimate sexual relations" constitutes a major life activity under the ADA. The similarity to the importance of "reproductive activity" and the fact that it seems to be in the same class of, if not often a related activity. One can anticipate similar arguments relating to "substantially limits" in terms of concern with the possibility of infecting a sexual partner and the possibility of violation of statute laws prohibiting certain sexual relations by HIV-infected persons.

An issue may also arise as to whether an HIV-infected individual remains disabled if drug therapies become available that may halt the reproduction of the virus, restore CD4+ count, or even neutralize HIV. This matter gains significance when one recalls that the majority began its discussion of HIV-infection with the sentence "[t]he disease follows a predictable and, as of today, an unalterable course."<sup>605</sup> The EEOC view is that the determination of disability should be made without regard to the ameliorative effects of medication.<sup>606</sup> Some courts, however, have found that when medication improves an individual's physical condition there is no disability.<sup>607</sup> The Court in *Bragdon* limited its consideration to the impact of medication in reducing perinatal transmission of HIV.

Another area that needs to be resolved is that of HIV infected health care workers and whether they are otherwise qualified. The existing case law permits restriction, reassignment or termination of HIV-infected health care workers who are engaged in what has been characterized as exposure-prone procedures.<sup>608</sup> This body of judicial opinion has held that such treatment of HIV-infected health care workers does not constitute discrimination under Title I of the ADA<sup>609</sup> or

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603. See *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998).

604. DOJ Memorandum II, *supra* note 87.

605. *Abbott*, 524 U.S. at 633.

606. See EEOC COMPLIANCE MANUAL (CCH) § 902.5 (Mar. 14, 1995).

607. See *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997).

608. See *Abbott*, 524 U.S. at 653-54.

609. See *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, (4th Cir. 1995) (upholding the dismissal of a neurosurgery resident who tested HIV-positive); *Mauro v. Bogess Med. Ctr.*, 886 F. Supp. 1349 (W.D. Mich. 1995) (upholding dismissal of a surgical student after report of his HIV-infection), *aff'd*, 137 F.3d 398 (6th Cir. 1998); *Doe v. Washington Univ.*, 780 F. Supp. 628 (E.D. Mo. 1991) (disenrollment of HIV-positive dental student).

under section 504 of the Rehabilitation Act of 1973<sup>610</sup> because such HIV-infected health care workers are not "otherwise qualified." Such adverse employment decisions have been legally sanctioned even though there is authority in the medical literature for the view that the risk of transmission from an infected patient to a health care worker is much greater than the risk of transmission from an infected health care worker to a patient. The case law, however, has distinguished the physician-patient relationship as placing a special duty on the physician "to do no harm" to the patient, with this special duty being cited in the opinions finding the HIV-infected physician "not otherwise qualified."<sup>611</sup> Such a distinction has no basis in the statutory language of the ADA. While this issue was raised by *Bragdon* in his arguments related to "direct threat," the Supreme Court chose not to address the issue. It is likely that future litigation will involve the matter of reconciling the direct threat analysis developed under Title III with the "otherwise qualified" analysis under Title I of the ADA and section 504 of the Rehabilitation Act.

The Supreme Court's opinion, standing alone, does not provide assurance of ADA protection for HIV infected persons who cannot show that they would otherwise engage in reproductive activity, but for their HIV infection. The elderly, post-menopausal women, homosexuals, males with vasectomies, females with hysterectomies, other persons who are sterile, children, and those who have chosen to be celibate might all fail to qualify under such a disability standard unless other major life activities are recognized in which these individuals would engage but for their HIV infection. Of course, the majority opinion hints that it is likely that in a properly argued case, the Supreme Court would take a broad view of major life activities impacted by HIV infection. Nevertheless, although the majority in *Bragdon* clearly held that HIV-infection, whether symptomatic or asymptomatic, is always an impairment under the ADA, the Court declined to decide that a person with HIV infection always is a person with a disability.

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610. 42 U.S.C. § 12,113(b) (1994).

611. *Id.* § 12,182(b)(3).





# THE PRIVACY PARADOX: THE DIVERGENT PATHS OF THE UNITED STATES SUPREME COURT AND STATE COURTS ON ISSUES OF SEXUALITY

MELANIE D. PRICE\*

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>1</sup>*

## INTRODUCTION

As the Warren Court evolved into the Rehnquist Court, individuals seeking constitutional redress and expanded privacy protections became increasingly frustrated with the United States Supreme Court. The Warren Court provided a high water mark for expanded privacy protections which continued to some degree during the Burger Court. However, the Reagan appointees, now with Chief Justice William Rehnquist at the helm, used the winds to sail in a different direction, retreating from the expansive constitutional interpretations used to protect individual privacy in the Warren Court era. Sensing the change in course, commentators began calling for state court judges to seek out independent meaning from their individual state constitutions.<sup>2</sup> A handful of states responded by amending their constitutions to expand protections, while other state courts used expansive interpretations of long-standing constitutional provisions of their individual charters. The array of protections varies dramatically based on the individual state constitutional framework. For instance, Oregon looked to its constitution to find that obscenity, while unprotected under the First Amendment of the U.S. Constitution, is protected under its constitution;<sup>3</sup> and Vermont more recently found that school vouchers violate the compelled support clause of its state constitution,<sup>4</sup> while the issue is unresolved under the Federal Constitution.

Earlier this century, the U.S. Supreme Court began a privacy revolution when it gave meaning to the Fourteenth Amendment's due process clause, finding that there were some fundamental rights not enumerated by the U.S. Constitution which were nonetheless constitutionally protected. In the ensuing years, privacy

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\* Judicial Clerk to the Honorable Robert D. Rucker, Associate Justice of the Indiana Supreme Court. B.A., 1985, Indiana University; J.D., 1999, Indiana University School of Law—Indianapolis. I would like to thank Professor Ronald J. Krotoszynski, Jr. for his insights on the topic of this Article as well as his friendship and mentoring during his tenure at Indiana University School of Law—Indianapolis (1995-2000)

1. U.S. CONST. amend X.

2. See William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Randall T. Shepherd, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1988).

3. See *State v. Henry*, 732 P.2d 9 (Or. 1987).

4. See *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (applying VT. CONST. ch. 1, art. 3), *cert. denied*, 120 S. Ct. 626 (1999).

concerns became increasingly important and the judiciary responded to calls for more protection. Although the revolution began on the federal level, the battles are now more often waged at the state level.<sup>5</sup>

This Article focuses on the evolution of constitutional protections of privacy rights as it has moved from a nationalized movement in the U.S. Supreme Court to a localized one in state courts around the country. Specifically, this Article focuses on two areas of privacy rights: (1) reproductive decisions, where the U.S. Supreme Court has established well-defined boundaries, and (2) protections for gays and lesbians, where the states are venturing into uncharted waters because of the void left by the U.S. Supreme Court. Part I will trace the U.S. Supreme Court's decisions as it dipped its toe into the privacy waters, muddled them and then began its retreat. Part II will look at the parallel universe of state constitutions and privacy protections. Part III will address reproductive rights jurisprudence, first under federal jurisprudence, then as the states responded to the U.S. Supreme Court's mandate. Part IV will contrast the U.S. Supreme Court's mandate as to reproductive decisionmaking with its lack of guidance in protecting gays and lesbians and examine state's responses to the lack of guidance.

#### I. THE FEDERAL MOVEMENT: THE BIRTH AND DEVELOPMENT OF THE PRIVACY MOVEMENT

Prior to the adoption of the Fourteenth Amendment in 1868, the citizens of the United States operated under a concept of dual citizenship, governed and protected separately under federal and state constitutions. Although the U.S. Constitution constrained federal action, that same constitution was not found to constrain the actions of individual states.<sup>6</sup> Not until the Supreme Court began incorporating federal constitutional protections to individual state actions did citizens have a mechanism to seek protection from the individual states when they sought to enact legislation or take action in direct contravention to the United States Constitution.

As the Court began to incorporate federal constitutional provisions into a body of law that likewise restrained states from acting, it also began finding

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5. During the 1998-99 Supreme Court term, the Court issued three decisions that curtailed the power of Congress to provide a forum for the judicial redress of state infringement upon federal rights: *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board*, 527 U.S. 666 (1999), and *Alden v. Maine*, 527 U.S. 706 (1999). This current term, the Supreme Court struck down two federal laws as an impermissible use of Congress's Commerce Power: *United States v. Morrison*, 120 S. Ct. 1740 (2000) (striking down the civil remedy provision of the Violence Against Women Act of 1994) and *Jones v. United States*, 120 S. Ct. 1904 (2000) (finding that owner-occupied residences are not "property" subject to federal prosecution for arson under 18 U.S.C. § 844 (1994 & Supp. IV 1998)).

6. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). But cf. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

protections that were not specifically enumerated. Slowly, the Court began to find certain fundamental and privacy rights woven in the fabric of the Constitution. However, it was not until the Twentieth Century that the Court actively extended constitutional protections for privacy and personal autonomy rights.

The adoption of the Fourteenth Amendment, coupled with the enactment of § 1983,<sup>7</sup> forever altered constitutional jurisprudence because citizens now had a private enforcement mechanism to protect individual liberties. The Fourteenth Amendment provided a wealth of opportunity for able attorneys to argue against unjust governmental intrusions and discriminations. Ultimately, the Fourteenth Amendment's Due Process Clause became the mechanism for the nationalization of individual privacy and autonomy rights. For example, the Due Process Clause has been interpreted to contain a substantive component that guarantees some of the rights we hold most dear: to raise children without unnecessary governmental intrusion,<sup>8</sup> workers' right to negotiate their employment terms,<sup>9</sup> women's right to control reproductive decisions,<sup>10</sup> and individuals to determine end of life issues.<sup>11</sup>

Congress passed the Fourteenth Amendment, along with the Thirteenth and Fifteenth Amendments, in response to the end of the Civil War and Reconstruction. Against this historical backdrop, the Court initially refused to find any substantive rights in the Fourteenth Amendment's language, other than the emancipation and liberation of the former slave population.<sup>12</sup> A full twenty

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7. 42 U.S.C. §1983 (1994) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

8. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1922).

9. See *Lochner v. New York*, 198 U.S. 45 (1905). But see *Rust v. Sullivan*, 500 U.S. 173 (1991) (medical providers in a government funded facility prohibited from counseling regarding abortion).

10. See *Roe v. Wade*, 410 U.S. 113 (1973).

11. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990).

12. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873), where the Court found that the one pervading purpose found in them all [Thirteenth, Fourteenth, and Fifteenth Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm

years after the ratification of the Fourteenth Amendment, the Court indicated a willingness to examine the reasonableness of state regulation and "look at the substance of things."<sup>13</sup> The Court also found that when a state claimed the legitimate use of its police power as a justification, if it "has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge. . . ." <sup>14</sup>

The Court gradually began to find substantive rights embedded in the Fourteenth Amendment, with early cases focusing on a strand of fundamental economic rights.<sup>15</sup> In these early cases the Court scrutinized restraints on economic activity. This movement, however, was short-lived, and the Great Depression and New Deal reforms quashed any expansion of economic substantive due process.

In the non-economic sphere, the Court began expanding individual rights as included in the concept of "liberty" and looked to the Fourteenth Amendment's Due Process Clause as the source of that expansion. Most notable were two cases from the 1920s in which the Court defined liberty to include the parental right to raise children. In *Myer v. Nebraska*,<sup>16</sup> the Court gave a broad interpretation to the concept of liberty, which

denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. . . .<sup>17</sup>

Likewise, in *Pierce v. Society of Sisters*,<sup>18</sup> the Court struck down an Oregon law that required all children be educated in the public school system because the state did not have the right to "standardize its children by forcing them to accept instruction from public teachers only."<sup>19</sup>

The Court marched on, finding the Equal Protection Clause of the Fourteenth Amendment<sup>20</sup> as a source of protection for individual rights. Beginning with

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establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.

13. *Muglar v. Kansas*, 123 U.S. 623, 661 (1887).

14. *Id.*

15. A discussion of economic due process is beyond the ambit of this Article. For a good review of economic due process, see Cass Sunstein, *Lochner's Legacy*, 87 COLUM.L.REV. 873 (1987).

16. 262 U.S. 390 (1923).

17. *Id.* at 399.

18. 268 U.S. 510 (1925).

19. *Id.* at 535.

20. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

*Skinner v. Oklahoma*,<sup>21</sup> the Court invalidated the Habitual Criminal Sterilization Act, which provided for compulsory sterilization after a third conviction for felonies involving "moral turpitude." Justice Douglas, relying on the Equal Protection Clause, opined that "[m]arriage and procreation are fundamental to the very existence and survival of the race."<sup>22</sup> Justice Douglas used the term "strict scrutiny," a term that would come to define modern day Fourteenth Amendment jurisprudence.<sup>23</sup> Thus, the die was cast and for the next forty or so years, the Court would continue to find unenumerated individual privacy and autonomy rights embedded in the Fourteenth Amendment.

## II. OVERVIEW OF PRIVACY RIGHTS UNDER STATE CONSTITUTIONS

Although the U.S. Constitution does not explicitly provide for privacy protections, aside from the Fourth Amendment's prohibition against unreasonable searches and seizures, people became accustomed to looking to the U.S. Constitution for the protection of privacy rights, especially during the mid-Twentieth Century when judicial activism was at its zenith. However, a handful of states predated the federal movement, and a number of states have since picked up the cause abandoned by the U.S. Supreme Court.

At the close of Nineteenth Century, Washington state entered the union with a constitutional provision specifically protecting privacy rights.<sup>24</sup> The next year Warren and Brandeis published the seminal article which expounded on the American "right to be let alone."<sup>25</sup> Thirty years later, Arizona, upon its admission to the union, followed Washington's lead and incorporated a verbatim statement of Washington's protection into its bill of rights.<sup>26</sup> Both Washington and Arizona preceded any federal notion of expressed personal privacy by almost fifty years.<sup>27</sup>

Almost a century later, Alaska, California, and Montana amended their constitutions to give their citizens privacy rights.<sup>28</sup> In the next ten years, Florida

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21. 316 U.S. 535 (1942)

22. *Id.* at 541.

23. Contrast *Skinner* with *Buck v. Bell*, 274 U.S. 200 (1927), where the Supreme Court upheld a Kansas state law which authorized sterilization for its institutionalized "mental defective." In what was perhaps Justice Holmes darkest moment, he found "Three generations of imbeciles are enough."

24. See WASH. CONST. art. I, § 7: "No person shall be disturbed in his private affairs, or his home invaded without authority of law." (1889)

25. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

26. See ARIZ. CONST. art. II, §8 (1910).

27. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

28. See ALASKA CONST. art. I, § 22: "The right of the people to privacy was recognized and shall not be infringed. The legislature shall implement this section."

CAL. CONST. art. I, §1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and



and Hawaii followed suit.<sup>29</sup> Both Montana and Hawaii took their cues from federal constitutional jurisprudence and included language requiring a "compelling state interest" to compromise privacy rights. Five other states and Hawaii include protections for some form of privacy rights within their search and seizure prohibitions.<sup>30</sup>

Increasingly, states have been willing to find privacy rights implicit in their state constitutions in seemingly disparate texts. For example, New Jersey locates privacy rights in a section of its constitution that sounds in natural rights<sup>31</sup> and Connecticut finds privacy rights in the preamble of its constitution.<sup>32</sup> Other state courts have found a variety of privacy and autonomy rights within their own constitutions. The most interesting of these cases are those that find laws and governmental practices violate their state constitutions even though the United States Supreme Court found that the exact same law or regulation did not violate the federal constitution. Perhaps most noteworthy is *Powell v. State*,<sup>33</sup> in which the Georgia Supreme Court found the anti-sodomy statute upheld in *Bowers v. Hardwick*<sup>34</sup> violated the Georgia constitution. Although the U.S. Supreme Court refused the invitation to find that the right to engage in consensual homosexual sodomy between adults as a constitutionally protected privacy right, the Georgia Supreme Court looked at the same statute a decade later and found that it violated its constitution.<sup>35</sup>

protecting property, and pursuing and obtaining safety, happiness and privacy."

MONT. CONST. art I, § 6: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

29. See FLA. CONST. art. I, § 23: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public records and meetings as provided by law."

HAW. CONST. art. I, § 6: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."

30. See ARIZ. CONST. art. II, § 8; HAW. CONST. art. I § 7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

31. See *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). N.J. CONST. art. 1, § 1 provides: "All person are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring and possessing, and protecting property, and of pursuing and obtaining safety and happiness."

32. See *Doe v. Maher*, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

33. 510 S.E.2d 18 (Ga.1998)

34. 478 U.S. 186 (1986).

35. Note that the challenge before the U.S. Supreme Court was brought by homosexuals, the challenge before the Georgia Supreme Court was brought by a heterosexual man. Although the Georgia Supreme Court did not explicitly find that the sodomy statute violated the rights of gays and lesbians, the statute was nonetheless struck down. In finding that private sexual acts fell within the protective ambit of the right to privacy, the court stated, "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell*, 510 S.E.2d at 24.

## III. REPRODUCTIVE FREEDOMS

From *Meyer*, *Pierce*, and *Skinner*, a theme emerged: that intrusive governmental regulations into family affairs would not be tolerated absent compelling reasons. From the loins of these cases sprang landmark cases that placed reproductive decisions at the pinnacle of constitutional jurisprudence. The U.S. Supreme Court has tinkered with its abortion jurisprudence, almost from the moment of its birth, creating well defined boundaries which states have been hesitant to expand, except for the notable area of public funding.

In a series of landmark decisions, the U.S. Supreme Court found that a woman has a fundamental right to privacy in making reproductive decisions. Beginning with *Griswold v. Connecticut*,<sup>36</sup> the Court held that married couples had a right to privacy in obtaining contraceptives and struck down a Connecticut law which prohibited the counseling for or use of contraceptive devices. The plaintiffs were the executive director of a Planned Parenthood affiliate and a physician. The issue was framed as the right of the marital relationship to be protected by the zone of privacy. Justice Douglas, writing for the majority, found the right to privacy in emanations of the First,<sup>37</sup> Third,<sup>38</sup> Fourth,<sup>39</sup> Fifth,<sup>40</sup> and Ninth Amendments.<sup>41</sup>

In 1972, the Supreme Court extended *Griswold* to protect the use of contraceptives for unmarried women. *Eisenstadt v. Baird*'s<sup>42</sup> expansion of *Griswold* six years later facilitated the Court's subsequent decision in *Roe v. Wade*<sup>43</sup> because the decision focused on sexual liberty as opposed to *Griswold*'s more narrow holding protecting the privacy rights of married couples. Justice Brennan took the step of extending the line of reproductive decisions, as applied to contraceptive decisions, to all women regardless of marital status. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>44</sup>

On *Eisenstadt*'s heels, the Supreme Court upheld a woman's right to procure an abortion. Relying heavily on *Eisenstadt*'s rhetoric, the Court, utilizing the trimester frameworks balanced the pregnant woman's privacy interests with the

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36. 381 U.S. 479 (1965).

37. The right of Association.

38. The prohibition against quartering troops in peace-time without consent.

39. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

40. The privilege against self-incrimination.

41. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

42. 405 U.S. 438 (1972).

43. 410 U.S. 113 (1973).

44. *Eisenstadt*, 405 U.S. at 453 (emphasis added).

state's interests in the health of the mother and the potential life of the fetus.<sup>45</sup> Essentially, the Court determined that during the first trimester, a woman has a fundamental right to seek an abortion, without state interference. During the second trimester, the state can regulate abortion as long as the restrictions are reasonably related to the "preservation and protection of maternal health,"<sup>46</sup> and at the end of the second trimester, the state can regulate abortions, including prohibiting the procedure, because the fetus can presumably have a "meaningful life outside of the mother's womb."<sup>47</sup> *Roe* left intact the right to procure therapeutic abortions when the mother's life or health is at stake, even after viability, a right that remains intact today.

Legal scholars immediately criticized *Roe* for its activist interpretation of the Constitution<sup>48</sup> and has remained under near constant attack from all levels of government as municipalities, states, and Congress have sought to enact regulations that chip away at a women's right to procure an abortion. In *Roe*'s immediate afterglow, the Supreme Court also struck down state laws that made access to abortion more difficult. For example, the Court struck down requirements for spousal consent,<sup>49</sup> parental consent that unduly burdens the right to seek an abortion,<sup>50</sup> a requirement that post-first trimester abortions be performed in a hospital,<sup>51</sup> burdensome requirements that medical providers give women detailed information about the development and viability of the fetus,<sup>52</sup> and a twenty-four hour waiting period.<sup>53</sup> Although the Supreme Court has consistently refused the invitation to overrule *Roe*, abortion rights' proponents live in constant fear that a change in the Court's composition could dramatically alter the landscape affecting reproductive decision making.

Even with the right to procure an abortion intact, poor women have not fared so well. An early area of diminished protections addressed public funding for abortions. Four years after deciding *Roe*, the Court upheld a Connecticut regulation that denied Medicare funding for non-medically necessary abortions while granting Medicare benefits for childbirth.<sup>54</sup> In a substantial departure from

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45. See *Roe*, 410 U.S. at 113.

46. *Id.* at 163.

47. *Id.*

48. See, e.g., Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (criticizing Court's failure to justify the trimester approach by dividing pregnancy into several segments with lines that clearly identify the limits of governmental power); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing Court's departure from balancing State and individual interests by requiring State to put forth at least some articulated rationale).

49. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

50. See *Bellotti v. Baird*, 428 U.S. 132 (1976).

51. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (Akron I), *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

52. See *id.*

53. See *id.*

54. See *Maher v. Roe*, 432 U.S. 464 (1977).

its preceding reproductive decisions, the Court applied an equal protection analysis as opposed to a substantive due process analysis. Indeed, Justice Powell rejected outright that the funding scheme interfered with a fundamental right. Foreshadowing the current standard for evaluating restrictions on abortion rights, Justice Powell noted that the "right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy,"<sup>55</sup> and not a wholesale right. Further chipping away at poor women's rights to procure an abortion, the Court next upheld the Hyde Amendment, which placed federal funding limitations on medically necessary abortions.<sup>56</sup>

This wall of protection, already suffering from cracks, developed a major fissure when the Court upheld Title X of the Public Health Service Act, which provided that any health clinic receiving federal funds was prohibited from counseling clients because abortion was a family planning option.<sup>57</sup> Chief Justice Rehnquist, for the first time writing a majority opinion in the abortion debate, wrote that "[t]he government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and implement that judgment by the allocation of public funds for medical services relating to child birth but not to those relating to abortion."<sup>58</sup> The Chief Justice did not look to the Fourteenth Amendment for support, but rather relied on Congress's Spending Power.<sup>59</sup>

Current direct regulations on abortion rights are protected under the Federal Constitution applying an "unduly burdensome" analysis. If a law is unduly burdensome, that is "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"<sup>60</sup> then it will be struck down. Applying a balancing-type test more typically found in First Amendment jurisprudence, the Court struck down a requirement that a married woman seeking an abortion must obtain her husband's consent.<sup>61</sup> However, the Court has upheld requirements of parental consent (so long as the opportunity for a judicial bypass exists),<sup>62</sup> that a medical provider must provide a woman with information that is truthful and non misleading,<sup>63</sup> a twenty-four hour waiting period,<sup>64</sup> and facility reporting requirements that

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55. *Id.* at 473-74.

56. *See Harris v. McRae*, 448 U.S. 297, 315 (1980) (finding that the Amendment, which severely limited the use of federal funds to reimburse the cost of abortion, placed no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, the Amendment encouraged "alternative activity deemed in the public interest").

57. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

58. *Id.* at 201 (quotations omitted).

59. U.S. CONST. art. I, § 8.

60. *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992).

61. *See id.* at 898.

62. *See id.* at 899.

63. *See id.* at 882.

64. *See id.* at 887.

provide general information.<sup>65</sup>

On June 28, 2000, the U.S. Supreme Court struck down Nebraska's partial birth abortion statute.<sup>66</sup> In a highly technical opinion, the Court found that the statute<sup>67</sup> failed because it lacked a maternal health exception and that it created an undue burden on a woman's right to choose an abortion because the statutory language covers a broader category of procedures than those commonly known as a partial birth abortion.<sup>68</sup>

Another contentious area in the abortion debate is regulating access for minors. As the U.S. Supreme Court has guaranteed minors the right to procure an abortion, states are not free to deny that right. In a series of cases,<sup>69</sup> the Court defined the acceptable parameters of parental notification. Essentially, a regulation may require parental notification for a minor, so long as she has the ability to demonstrate that she is a mature minor capable of making such a choice without securing parental consent. The Court also has upheld a "best interest" test, which allows a minor to demonstrate, maturity notwithstanding, procuring an abortion is in her best interests. Courts must provide an expeditious judicial decision so as not to deprive the young woman of her right to choose an abortion but the Court has thus far left the decision to the states to impose procedural

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65. See *id.* at 901.

66. *Stenberg v. Carhart*, No. 99-830, 2000 WL 825889 (U.S. June 28, 2000).

67. NEB. REV. STAT. ANN. § 28-328(1) (Supp. 1999) provided: "No partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

Section 28-326(9) defines partial birth abortion as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing delivery."

Section 28-326(9) further defines "partially delivers vaginally a living unborn child before killing the unborn child" as "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such a procedure knows will kill the unborn child and does kill the unborn child." *Id.*

68. The statute sought to prohibit a procedure known as "D & X," which is described as

1. Deliberate dilation of the cervix, usually over a sequence of days;
2. Instrumental conversion of the fetus to a footling breech;
3. Breech extraction of the body excepting the head; and
4. Partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.

*Stenberg*, 2000 WL 825889, at \*8 (quoting American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilation and Extraction (Jan. 12, 1997)).

69. *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502 (1990); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

requirements for minors seeking an abortion.<sup>70</sup>

### A. *Protecting Reproductive Rights Independently Under State Constitutions*

"Government is not free to achieve with carrots what is forbidden to achieve with sticks."<sup>71</sup>

Reproductive rights is an area where litigants have actively sought additional protections from their state constitutions. Although a number of state courts have addressed abortion rights, U.S. Supreme Court jurisprudence has largely defined the parameters of what constitutes acceptable restrictions. Indeed, there has been little need to determine whether individual constitutions protect the basic right to obtain an abortion because "[i]n *Roe v. Wade*, sweeping aside previous prohibitions, the Supreme Court bottomed the right to expel an unwanted pregnancy on the choice of the private uses of one's body."<sup>72</sup> Even so, California, Connecticut, Florida, Massachusetts, Minnesota, Mississippi and Ohio have explicitly found an independent right to abortion embedded in their constitutions.

Florida's explicit privacy protection confers an independent right to abortion.<sup>73</sup> Likewise, in California the privacy provision of its constitution,<sup>74</sup> coupled with a provision that the rights "guaranteed by this Constitution are not dependent of those guaranteed by the U.S. Constitution,"<sup>75</sup> provide "the woman's right of procreative choice as an aspect of the right of privacy under the explicit provisions of our Constitution is at least as broad as that described in *Roe v. Wade*."<sup>76</sup>

70. See *Bellotti II*, 443 U.S. at 644 (plurality) (statute could involve parent in minor's abortion decision only so long as the statute contained an alternative procedure to prevent an absolute parental veto). But see *H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notification law passes constitutional muster so long as there is a judicial bypass procedure).

71. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 15-10, at 933 n.77 (1978), quoted in *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 799 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134, 153 (Conn. Super. Ct. 1986); *Women's Health Center v. Panepinto*, 446 S.E.2d 658, 666 (W. Va. 1993).

72. *Fischer v. Department of Public Welfare*, 502 A.2d 114, 116 (Pa. 1985).

73. See *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) ("The Florida constitution embodies the principle that few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice is freely fundamental.") (internal quotation marks and citations omitted).

74. CAL. CONST. art. I § 1 provides: "All people are by nature free and independent and have certain inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing a protecting property and pursuing and obtaining safety, happiness and *privacy*." (emphasis added).

75. *Id.* § 24 (adopted 1972).

76. *Committee to Defend Reproductive Rights*, 625 P.2d at 796.



Connecticut looked to the preamble of its constitution<sup>77</sup> and its due process clause<sup>78</sup> to find "the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice."<sup>79</sup> Minnesota looked to *Skinner v. Oklahoma* for guidance and noted that it had previously located privacy rights in three of its constitutional provisions,<sup>80</sup> concluding that "the right to privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy" because

[w]e can think of few decisions more intimate, personal, and profound than a woman's decision between childbirth and abortion. Indeed, this decision is of such great import that it governs whether the woman will undergo extreme physical and psychological changes and whether she will create lifelong attachments and responsibilities.<sup>81</sup>

The Minnesota court made clear that, unlike the federal Constitution which protects the right to abortion, the Minnesota constitution "protects the women's *decision to abort*; [and] any legislation infringing on the decision-making process, then, violates this fundamental right."<sup>82</sup> Therefore, while the U.S. Supreme Court has permitted states to create hurdles such as waiting periods and incentives for a woman to choose birth over abortion, presumably these obstacles would violate Minnesota's constitution.

Mississippi found article I, section 32<sup>83</sup> of its constitution—which mirrors the Ninth Amendment—instructive: "While we do not interpret our Constitution as

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The preamble of the constitution makes clear that it reserves to the people "the liberties rights and privileges which they have derived from their ancestors"; and the preface clause to the declaration of rights, article first, broadly incorporates the concept of ordered liberty by stating, "[t]hat the great and essential principles of liberty and free government may be recognized and established . . .," which clause is followed by a declaration of specific rights.

*Doe v. Maher*, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

78. "Every person for an injury done to him in his person, property or reputation, shall have remedy by due course of law." CONN. CONST., art. I, § 10.

79. *Maher*, 515 A.2d at 150.

80. MINN. CONST. art. I, § 1, which provides: "Government is instituted for the security, benefit and protection of the peoples . . ."; art. I, § 2 which provides: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers . . ."; and art. I, § 10 which provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ." It is noteworthy that the court also found an additional source of privacy in Art. I, § 10 which provides "No person shall be . . . deprived of life, liberty or property without due process of law."

81. *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995).

82. *Id.* at 31 (emphasis added).

83. "The enumeration of rights in this constitution shall not be construed to deny or impair others retained by, and inherent in, the people." MISS. CONST. art. III, § 32.

recognizing an explicit right to abortion, we believe that autonomous bodily integrity is protected under the right to privacy . . . [which includes] an implicit right to have an abortion.”<sup>84</sup> And the Ohio Court of Appeals relied on its natural rights provision,<sup>85</sup> to declare “it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection.”<sup>86</sup>

Notwithstanding the need to determine whether an particular state constitution provides an independent basis for abortion rights, states have sometimes granted more protections than those found in the federal constitution.

### *B. State Funding*

“The rich get richer and the poor get . . . children.”<sup>87</sup>

The most litigated area of state abortion jurisprudence concerns state funding for indigent women to procure an abortion. California, Connecticut, Massachusetts, Minnesota, New Jersey, New Mexico, and West Virginia have utilized various provisions of their state constitutions to invalidate funding schemes which provide funding for childbirth expenses of indigent women but not for abortions, or some variation thereof. The constitutional provisions employed as well as the statutory schemes restrictions vary. As established in *Harris v. McRae*, a woman cannot be deprived the right to procure an abortion if her life is at risk.<sup>88</sup> However, she has no constitutionally protected right to public funding. Abortions not performed for medical reasons are commonly referred to as therapeutic abortions and likewise have no right to public funding. Therefore, litigants seeking public funding for abortions must look to state constitutions for redress. Some states have carved out exceptions in the case of rape, incest, and medical emergency, but deny abortions to all other indigent women.

In some states, litigants have successfully challenged funding schemes under their due process clause. California, Connecticut, Massachusetts, Minnesota, and West Virginia have all found that the right of indigent women to obtain state funding for abortions rises to the level of a fundamental right and, therefore, to discriminate between medical reasons violates a woman’s substantive due process rights. California relied on its privacy text to strike down restrictions that exclude potential recipients of government entitlements solely on their desire to exercise their constitutional rights. Under a three part analysis, the court

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84. *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 653 (Miss. 1998).

85. “All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.” OHIO CONST. art. I, § 1 (1802).

86. *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993).

87. *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779, 799 n.32 (Cal. 1981) (quoting RICHARD WHITNEY, *Ain’t We Got Fun*).

88. 448 U.S. 297 (1980).

cautioned "the government bears a heavy burden of demonstrating the practical necessity for such unequal treatment."<sup>89</sup>

Likewise, Connecticut looked to its preamble and due process clause to find that "once the state has chosen to [pay for medical treatment of the poor] . . . it must preserve neutrality,"<sup>90</sup> and therefore the state must fund medically necessary or therapeutic abortions. Minnesota found that its privacy and due process clauses<sup>91</sup> mandated that the "State cannot refuse to provide abortions to [state funded] eligible women when the procedure is necessary for therapeutic reasons."<sup>92</sup> Finally, Massachusetts invalidated a restrictive funding scheme because "the challenged restriction impermissibly burdens a right protected by our constitutional guarantee of due process."<sup>93</sup>

The most successful challenges to these regulations, however, invoke the state constitutional equivalent of the equal protection clause, arguing that providing funds for some classes of indigent women but not all indigent women is an impermissible burden. For instance, New Jersey declared a funding scheme unconstitutional that provided no funding beyond that guaranteed under federal analysis, while funding the costs of medically necessary procedures pertaining to childbirth.<sup>94</sup> The New Jersey Supreme Court found that article I, part 1 of its constitution presumes equal protection of the laws.<sup>95</sup> Although the court claimed to apply an analysis different from that used under the federal constitution,<sup>96</sup> it actually applied federal equal protection analysis and found the right to choose to have an abortion is a fundamental right that requires the state to put forth a compelling state interest. Under this analysis, providing funding "when life is

89. *Committee to Defend Reproductive Rights*, 675 P.2d at 786 (citations omitted).

90. *Doe v. Maher*, 515 A.2d 134, 152 (Conn. Super. Ct. 1986).

91. MINN. CONST. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people. . . ."); art. I, §2 ("No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peer. . . ."); art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated. . . ."); art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law . . . nor be deprived of life, liberty or property without due process of law.").

92. *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995).

93. *Moe v. Secretary of Administration and Finance*, 417 N.E.2d 387, 397 (Mass. 1981).

94. *See Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

95. "All persons are by nature free and independent, and have certain natural and unalienable rights, among which those are not enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, par. 1.

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Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or denial.

*Byrne*, 450 A.2d at 936 (quoting *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J.1973)).

at risk, but withholding them when health is endangered . . . denies equal protection to those women entitled to necessary medical services under Medicaid."<sup>97</sup>

Similarly, West Virginia relied on its Common Benefits Clause<sup>98</sup> to find that "when state government seeks to act 'for the common benefit, protection and security of the people' in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of our citizens."<sup>99</sup> Because the Common Benefits clause imposes an "obligation upon state government to preserve its neutrality when it provides a vehicle for the exercise of constitutional rights,"<sup>100</sup> the court struck down a scheme that provided funds for childbirth but only for abortion in the limited circumstances provided under federal standards. The West Virginian Supreme Court found it impermissible to cover abortions when the mother's life is in danger but not for other health reasons.

Connecticut also looked to their equal protection clause to deem funding schemes unconstitutional. Connecticut's Equal Protection Clause<sup>101</sup> requires analysis independent of that found under the federal constitution.<sup>102</sup> Applying an "unreasonable benefits" analysis, the court deemed unconstitutional a regulation that restricted funding to those abortions "necessary because the life of the mother would be endangered if the fetus were carried to term,"<sup>103</sup> because "the regulation discriminates by funding all medically necessary procedures and services except therapeutic abortions."<sup>104</sup>

However, state constitutional provisions analogous to the federal Equal Protection Clause are not always a panacea for funding challenges. Restrictive funding schemes in Michigan, New York, North Carolina, and Pennsylvania have survived equal protection challenges under their respective state constitutions.

The voters of Michigan passed a referendum that prohibited state funding for all abortions except those necessary to save the mother's life. Plaintiffs

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97. *Id.* at 934.

98. W. VA. CONST. art. III, § 3 provides: "Government is instituted for the common benefit, protection and security of the people, nation or community."

99. *Women's Health Center v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993).

100. *Id.* at 666 (quoting *United Mine Workers v. Parsons*, 305 S.E.2d 343, 354 (W. Va. 1983)).

101. CONN. CONST. art. I, § 20 provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, sex or physical or mental disabilities." (as amended, 1974).

102. "The Connecticut equal protection clauses require the state when extending benefits to keep them 'free of unreasoned distinctions that can only impede the open and equal' exercise of fundamental rights." *Doe v. Maher*, 515 A.2d 134, 158 (Conn. Super. Ct. 1986) (quoting *D'Amico v. Manson*, 476 A.2d 543 (Conn. 1984)).

103. *Id.* (quoting Policy 275 of 3 Manual, Department of Income Maintenance Medical Assistance Program, c. III (1981)).

104. *Id.* at 159.

challenged the law as violative of the equal protection clause, alleging that it "accords unequal treatment between two classes of Medicaid-qualified pregnant women—those who choose childbirth and those who choose abortion."<sup>105</sup> Noting that the language of its equal protection clause is almost identical to that of the federal constitution, the court applied rationality review and found that the Medicaid funding scheme did not impede the woman's right to *choose* abortion, but rather has merely made "childbirth a more attractive option by paying for it, but has imposed no restriction on abortion that was not already there."<sup>106</sup>

Likewise, North Carolina tersely dismissed all state constitutional challenges, including an equal protection claim, to its funding scheme because "[i]t is not necessary that State action be rationally related to all State objectives. It is enough that it is related to some legitimate State objective."<sup>107</sup> The court found that, in North Carolina, the encouragement of childbirth is a legitimate governmental objective. While the court declined to address the equal protection challenge, Justice Parker's dissent indicated that a scheme that withheld state funding for abortions except when the pregnancy is a result of rape or incest or the woman's life is in danger would violate the state's equal protection clause.<sup>108</sup>

Pennsylvania and New York also found that their respective equal protection clauses did not extend abortion funding beyond federal parameters. The Supreme Court of Pennsylvania looked to its equal protection clauses,<sup>109</sup> noted that it was guided by federal equal protection analysis, and applied an intermediate level of scrutiny to a regulation that granted state funds for abortions that are a result of rape or incest, or where necessary to avert the death of the mother. The court upheld the regulations because "to say that the Commonwealth's interest in attempting to preserve a potential life is not important is to fly in the face of our own existence."<sup>110</sup>

New York applied its Equal Protection Clause to uphold a program that offered medical services to indigent women, but withheld funds for medically necessary abortions. New York's scheme was unique because its Medicaid program funded all medically necessary abortions. The program challenged was the Public Health Assistance Program (PCAP), which was a federal program providing reimbursement to states which paid for prenatal care and related services. The court found this program did not violate any constitutional

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105. *Doe v. Department of Social Servs.*, 487 N.W.2d 166, 170 (Mich. 1992).

106. *Id.* at 178.

107. *Rosie J. v. Department of Human Resources*, 491 S.E.2d 535, 537-38 (N.C. 1997).

108. *See id.* at 538 (Parker, J., dissenting).

109. Pennsylvania's constitution has two clauses that have been interpreted to guarantee equal protection of the laws: Art. I, § 21 provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Art. III, § 32 provides: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law. . . Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law."

110. *Fischer v. Department of Pub. Welfare*, 502 A.2d 114, 122 (Pa. 1985).

provision because the eligible woman "[u]nlike an indigent woman, whose option to choose an abortion is arguably foreclosed by her lack of resources, the PCAP-eligible woman . . . presumptively has the financial means to exercise her fundamental right of choice."<sup>111</sup>

Those litigants in states that have adopted an Equal Rights Amendment have also challenged funding restrictions with varying success.<sup>112</sup> Finally, the voters of Arkansas took the funding determination from the court's purview by adopting a constitutional amendment prohibiting state funding.<sup>113</sup>

### C. Other Restrictions

Finally, states have imposed parental and informed consent restrictions, consistent with those upheld in *Casey*.<sup>114</sup> Florida is the only state that has found broader protections in its constitution. Applying language sounding in federal substantive due process analysis, the Florida court found the state's expressed interests, protection of the minor and preservation of the family unit, were not sufficiently compelling to override the minor's privacy interests throughout the

111. *Hope v. Perales*, 634 N.E.2d 183, 188 (N.Y. 1994).

112. *See Doe v. Maher*, 135 A.2d 134, 159 (Conn. Super. Ct. 1986) ("Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.") (footnote omitted); *New Mexico Right to Choose/ NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) ("[T]he New Mexico Equal Rights Amendment is a specific prohibition that provides a legal remedy for the invidious discrimination that prevailed under the common law and civil law traditions that preceded it."), *cert. denied*, *Klecan v. New Mexico Right to Choose/NARAL*, 526 U.S. 1020 (1999). *Cf. Fischer*, 502 A.2d at 125 (in upholding funding restrictions, the court opined "the basis for the distinction here is not sex but abortion, and the statute does not accord varying benefits to men and women because of their sex, but accords varying benefits to one class of women, as distinct from another, based on a voluntary choice made by the women.") (footnote omitted).

113. ARK. CONST. amend. 68, §1 ("No public funds will be used to pay for any abortion, except to save the mother's life."). This Amendment was subsequently declared unconstitutional. This amendment has an interesting history. An Arkansas Chancery Court permanently issued a permanent injunction against a state university which performed abortions for reasons other than to save the mother's life. Subsequently, the federal district court of Arkansas found this amendment void because it conflicted with the supremacy clause of the Federal Constitution and permanently enjoined enforcement of the amendment. *See Little Rock Family Planning Servs. v. Dalton*, 860 F. Supp. 609, 627 (E.D. Ark. 1994), *aff'd* 60 F.3d 497 (1995), *cert granted in part, judgment rev'd in part per curiam*, 516 U.S. 474 (1996).

114. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court held that it is not an undue burden to require parental consent for minors seeking an abortion so long as there is an opportunity for a minor to seek a judicial bypass. Similarly, it does not impose an undue burden to require a woman to be fully informed of the abortion process and require a waiting period of limited duration.



pregnancy.<sup>115</sup> The court also found defects in the procedures in the judicial bypass hearing; specifically, the Florida constitution required both appointed counsel and a record of the hearing for meaningful appellate review.<sup>116</sup>

Both Ohio and Mississippi, although recognizing an independent right to abortion, nonetheless applied an undue burden analysis to uphold challenges to waiting periods and parental consent consistent with *Casey*. Mississippi relied entirely on federal precedent and found that its parental consent law and twenty-four hour waiting period passed constitutional muster.<sup>117</sup> Litigants in Ohio were more creative in their challenge to its informed consent requirement, raising challenges under their constitution's natural rights provision,<sup>118</sup> its free exercise clause,<sup>119</sup> free speech Amendment,<sup>120</sup> and its equal protection clause.<sup>121</sup> The Ohio Supreme Court, while finding an independent right to abortion, upheld the regulation because "[w]e are unable to distinguish the Ohio statutes from the Pennsylvania statutes involved in [*Casey*] and find no basis for determining . . . [the] Ohio Constitution imposes greater restrictions upon the state than are imposed by the United States Constitution. . . ."<sup>122</sup>

Thus far, Indiana has not had the opportunity to determine whether the Indiana Constitution protects a woman's right to abortion independent of the U.S. Constitution. In 1996, Indiana passed restrictive abortion impediments requiring, inter alia, mandatory disclosure eighteen hours before the abortion is to be performed on a variety of non-medical information from the medical provider in order to procure informed consent.<sup>123</sup> Abortion providers, consisting of health

115. See *In re T.W.*, 551 So.2d 1186, 1195 (Fla. 1989).

116. See *id.* at 1196.

117. See *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998).

118. See OHIO CONST. art I, § 1 ("All men are by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and seeking and obtaining safety and happiness.").

119. OHIO CONST. art. I, § 7.

120. OHIO CONST. art. I, § 11.

121. OHIO CONST. art. I, § 2.

122. *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 578 (Ohio Ct. App. 1993).

123. At least 18 hours before the abortion and in the presence of the pregnant woman, the physician who is to perform the abortion, the referring physician or a physician assistant (as defined in IND. CODE § 25-27.5-2-10), an advanced practice nurse (as defined in *id.* § 25-23-1-1(b)), or a midwife (as defined in *id.* § 27-12-2-19) to whom the responsibility has been delegated by the physician who is to perform the abortion or the referring physician has orally informed the pregnant woman of the following:

- (A) The name of the physician performing the abortion.
- (B) The nature of the proposed procedure or treatment.
- (C) The risks of and alternatives to the procedure or treatment.
- (D) The probable gestational age of the fetus, including an offer to provide:
  - (i) a picture of a fetus;
  - (ii) the dimensions of a fetus; and
  - (iii) relevant information on the potential survival of an unborn fetus;

clinics and a medical doctor, sought a preliminary injunction in federal court, challenging the law as unduly burdensome under *Casey*, raising only federal constitutional claims. The plaintiffs also challenged a medical emergency exception allowing women to forego the eighteen-hour waiting period as being too narrowly drawn,<sup>124</sup> and the federal court certified this question of statutory interpretation to the Indiana Supreme Court.<sup>125</sup> In carefully crafted opinion,<sup>126</sup> the Indiana Supreme Court only looked to principles of statutory interpretation to decide the certified questions before it.<sup>127</sup> It is therefore uncertain as to whether the right to choose an abortion is protected under the Indiana constitution.

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at this stage of development.

(E) The medical risks associated with carrying the fetus to term.

(2) At least eighteen (18) hours before the abortion, the pregnant woman will be orally informed of the following:

(A) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care from the county office of family and children.

(B) That the father of the unborn fetus is legally required to assist in the support of the child. In the case of rape, the information required under this clause may be omitted.

(C) That adoption alternatives are available and that adoptive parents may legally pay the costs of prenatal care, childbirth, and neonatal care.

(3) The pregnant woman certifies in writing, before the abortion is performed, that the information required by subdivisions (1) and (2) has been provided.

IND. CODE § 16-34-2-1.1 (1998).

124. Public Law 187 defines medical emergency as:

“Medical emergency,” for purposes of IC 16-34, means a condition that, on the basis of the attending physician’s good faith clinical judgment, complicates the medical condition of a pregnant woman so that it necessitates the immediate termination of her pregnancy to avert her death or for which a delay would create serious risk of substantial and irreversible impairment of a major bodily function.

IND. CODE § 16-18-2-223.5 (1998).

125. See *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 904 F. Supp. 1434 (1995).

126. *A Woman’s Choice-East Side Women’s Clinic v. Newman*, 671 N.E.2d 104 (Ind. 1996).  
127.

(A) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance would in any way pose a significant threat to the life or health of the woman?

(B) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance threatens to cause severe but temporary physical health problems for the woman?

(C) Does the definition except a woman from compliance with Ind. Code § 16-34-2-1.1 when such compliance threatens to cause severe psychological harm to the woman?

*Id.*

## IV. DISCRIMINATION AND PROTECTIONS FOR HOMOSEXUALS

Although the Court has expanded privacy protections to familial and reproductive decisions, the Court has not been as friendly to challenges by members of groups that do not resemble traditional notions of family, particularly members of the homosexual community. The initial challenges attempted to utilize the Due Process Clause of the Fourteenth Amendment to afford protections for gays and lesbians. When this tactic proved unsuccessful, litigants invoked the Equal Protection Clause, with marginal success. State courts, unguided by federal jurisprudence, have found protections within their constitutions; a stark contrast to reproductive jurisprudence.

The Supreme Court first passed on an opportunity to decide the constitutionality of criminalizing homosexual sodomy when a majority of the Court summarily affirmed a federal court's dismissal of a suit brought by male homosexuals challenging Virginia's sodomy law.<sup>128</sup> It took another decade for the Court to address the validity of sodomy laws.

In *Bowers v. Hardwick*,<sup>129</sup> the Court reversed the Fifth Circuit Court of Appeals holding that the Georgia sodomy statute unconstitutional. The circuit court had looked to *Griswold*, *Eisenstadt*, and *Roe* to find the statute unconstitutional, as it "violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation."<sup>130</sup> Justice White, writing for the majority, framed the question before the Court as: "[W]hether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal . . . ."<sup>131</sup> The Court looked at its previous privacy rights cases and determined that it is "evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . ."<sup>132</sup> Finally, the Court articulated the current standard used under substantive due process analysis. To classify as a fundamental right, it must be either "implicit in the concept of ordered liberty"<sup>133</sup> or "deeply rooted in this Nation's history and tradition."<sup>134</sup> The Court's pronouncement was clear: protections for gays and lesbians would not be found in the Due Process Clause. In the aftermath of *Bowers*, commentators lamented the death of substantive due process.<sup>135</sup> Changing tactics, the next challenge came under the Equal Protection

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128. See *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

129. 478 U.S. 186 (1986).

130. *Id.* at 189.

131. *Id.* at 190.

132. *Id.* at 190-91.

133. *Id.* at 191.

134. *Id.* at 192.

135. See, e.g., Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987).

Clause.

*A. The Equal Protection Clause*

The Equal Protection Clause is most often invoked when disfavored groups seek legal redress for overt discrimination. Although the Equal Protection Clause has been used successfully to challenge racial classifications, and more recently gender classifications, gays and lesbians have had considerably less success than other groups. However, the Equal Protection Clause at least provides a modicum of protection, unlike the Due Process Clause.

The U.S. Supreme Court initially applied the Equal Protection Clause to guarantee "the political equality" of the newly freed African-American citizen. In *Plessy v. Ferguson*,<sup>136</sup> however, the Supreme Court found that separate but equal accommodations complied with the Fourteenth Amendment's mandate. The Court soon retreated from this stance, and subsequently applied strict scrutiny to challenges that laws and governmental action were racially discriminatory. While many of the challenges to racial discrimination affected access to public accommodations and benefits, there was a strand of equal protection jurisprudence that addressed fundamental rights, including privacy.

The Court decided a troika of cases that extended equal protection guarantees to African-Americans seeking privacy rights in family relations. Beginning with *McLaughlin v. Florida*,<sup>137</sup> the Court invalidated a criminal statute prohibiting cohabitation by interracial married couples. Applying strict scrutiny, the Court found that the racial classification amounted to nothing more than invidious discrimination.<sup>138</sup> *McLaughlin* overruled an earlier case in which the Court had upheld a statute which prohibited adultery or fornication between blacks and whites.<sup>139</sup>

Three years later, Chief Justice Warren penned *Loving v. Virginia*,<sup>140</sup> which sounded the death knell for miscegenation laws because "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."<sup>141</sup> It is important to note that at the time the Court decided *Loving*, it had already established privacy rights to raise a family and seek birth control, rights that were sought by majoritarian interests.

Lastly, the Court reversed a child custody determination that awarded the father custody even though the mother had initially been awarded custody because the mother had remarried an African-American.<sup>142</sup> The trial court had determined that the best interests of the child dictated the father have custody because "despite the strides that have been made in bettering relations between

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136. 163 U.S. 537 (1896).

137. 379 U.S. 184 (1964).

138. *See id.* at 197.

139. *See Pace v. Alabama*, 106 U.S. (16 Otto) 583 (1883).

140. 388 U.S. 1 (1967).

141. *Id.* at 12.

142. *See Palmore v. Sidoti*, 466 U.S. 429 (1984).

the races in this country, it is inevitable that [the child] will, if allowed to remain in the present [custody], . . . suffer from the social stigmatization that is sure to come."<sup>143</sup> A unanimous Court struck down the lower court, noting "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>144</sup>

Having firmly established that equal protection applied to racial classifications in the sphere of family privacy interests, litigants began looking to the Equal Protection Clause to afford more protections for disfavored groups. From the loins of the Equal Protection Clause also sprang fundamental rights, particularly in access to education<sup>145</sup> and the exercise of the franchise.<sup>146</sup> Of interest to this article is the Court's treatment of challenges to governmental action that discriminates against gays and lesbians.

Thus far, the Court has only spoken once regarding an Equal Protection challenge to discriminations against homosexuals. *Romer v. Evans*<sup>147</sup> addressed a challenge to an amendment to the Colorado constitution, that provided

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>148</sup>

The trial court enjoined enforcement of this amendment and the Colorado Supreme Court, applying strict scrutiny under equal protection analysis, affirmed.<sup>149</sup> The U.S. Supreme Court, while affirming the injunction, refused to grant gays and lesbians suspect or quasi-suspect classification. However, the

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143. *Id.* at 431 (citation omitted).

144. *Id.* at 433.

145. *Compare* Plyer v. Doe, 457 U.S. 202 (1982) (the exclusion of undocumented alien children from a free public education offends the Equal Protection Clause), *with* San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (Equal Protection Clause is not offended by a system of public school financing which produces substantial interdistrict disparities in per-pupil expenditures relating to property tax base disparities); *Martinez v. Bynum*, 461 U.S. 321 (1983) (rejecting Equal Protection challenge to law which denied tuition free education to minors not residing with parents and whose presence in school district was for primary purpose of attending public school tuition-free); and *Kadrmas v. Dickinson Public Schs.*, 487 U.S. 450 (1988) (no Equal Protection violation to assess a user fee to transport students to and from public schools).

146. *See* *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

147. 517 U.S. 620 (1996).

148. *Id.* at 624 (quoting COLO. CONST. art. II, § 30(b)).

149. *See* *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *aff'd*, 517 U.S. at 620.

Colorado constitutional amendment failed even the most deferential rationality review because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies,"<sup>150</sup> a blatant violation of the Equal Protection Clause.

*Romer* is the latest word from the U.S. Supreme Court on the status of gay rights.<sup>151</sup> There is wide speculation that *Romer* overrules *Bowers*.<sup>152</sup> At a minimum it is clear that *Romer* established that blanket discriminations against gays and lesbians, while not meriting fundamental right status, will be hard-pressed to survive rationality review.

### B. States and Criminalized Same Sex Activity

While the Supreme Court has been reticent to establish more than an iota of protection for homosexuals, a handful of states have found greater protection for these groups under their constitutions. Specifically, citizens have been successful in either repealing sodomy laws through the legislative process, similar to the statute upheld in *Bowers*, relying on the judiciary to find such statutes unconstitutional.

There are currently sixteen states that still have sodomy or deviate sexual conduct laws.<sup>153</sup> Of these states, there are pending legal challenges in Arkansas, Louisiana, and Texas.<sup>154</sup> Georgia and New Jersey have disposed of sodomy statutes when faced with challenges from heterosexual litigants.<sup>155</sup> An Oklahoma

150. *Romer*, 517 U.S. at 627.

151. However, on the last day of the Supreme Court's current term, it handed down *Boys Scouts of America v. Dale*, No. 99-699, 2000 WL 826941 (U.S. June 28, 2000), in which the Court held that applying New Jersey's State's Public Accommodation Law to require the Boy Scouts to admit an avowed homosexual as an assistant scoutmaster violates the Boy Scouts' First Amendment right of expressive association. Mostly relying on the right of expressive association, the Court does find that the forced inclusion of an avowed homosexual "would significantly affect the Boy Scout's ability to advocate public or private viewpoints." *Id.* at \*5. The Court relies on the Scout's Oath which pledges to "do my best. . . to keep myself . . . morally straight" and the Scout Law, which maintains that "A Scout is . . . Clean" to reach this conclusion. *Id.*

152. See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996); Katherine M. Hamill, Comment, *Romer v. Evans: Dulling the Equal Protection Gloss on Bowers v. Hardwick*, 77 B.U.L. REV. 655 (1997); Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343 (1997) (Symposium Issue: Intersexions: The Legal & Social Construction of Sexual Orientation).

153. Alabama, Arizona, Arkansas, Florida, Idaho, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. See *Lambda Legal Defense and Education Fund* (visited July 21, 2000) <<http://www.lambdalegal.org>>.

154. These states, along with Kansas, have statutes prohibiting same sex sodomy. See *id.*

155. See *Powell v. State*, 510 S.E.2d 18 (Ga. 1998) (finding that sodomy statute at issue in *Bowers v. Hardwick* offends the Georgia constitution); *State v. Saunders*, 381 A.2d 333 (N.J. 1977) (holding that fornication statute, which prohibits sexual intercourse with unmarried women, violates



court, relying entirely on federal precedent, invalidated a statute prohibiting "crimes against nature" as applied where the defendant engaged in consensual, heterosexual anal and oral intercourse.<sup>156</sup> Likewise, the Court of Appeals of New York looked to Fourteenth Amendment precedent to invalidate its consensual sodomy statute.<sup>157</sup> The supreme courts of Kentucky, Montana, and Pennsylvania have struck down homosexual sodomy statutes, relying on the text of their constitutions. Lower court decisions in Michigan and Tennessee have done likewise.

Pennsylvania, which has not been inclined to find much protection in the abortion realm, was one of the first states to strike down its sodomy statute in *Commonwealth v. Bonadio*,<sup>158</sup> even before the U.S. Supreme Court decided *Bowers*. In a carefully crafted opinion that avoided addressing the issue of same gender relations,<sup>159</sup> the court found that the statute exceeded

the proper bounds of the police power . . . [and] offends the Constitution by creating a classification based on marital status (making deviate acts criminal only when performed between unmarried persons) where such differential treatment is not supported by a sufficient state interest and thereby denies equal protection of the laws.<sup>160</sup>

The court passed on determining whether the right to engage in deviate sexual conduct (as defined by statute), offends any fundamental right, and instead applied rationality review. The court struck the statute because the state's interest in forbidding certain non-marital sexual conduct does "not bear a substantial relation to a valid legislative objective."<sup>161</sup>

The Court of Appeals of New York did not even look to its constitution to invalidate its consensual sodomy statute, but rather looked to the Fourteenth Amendment's Due Process and Equal Protection clauses six years before the Supreme Court decided *Bowers*.<sup>162</sup> Although at least one of the litigants was a homosexual man<sup>163</sup> convicted under a New York statute which prohibited

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state constitutional right to privacy).

156. *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

157. *See People v. Onofre*, 415 N.E.2d 936 (N.Y. Ct. App. 1980).

158. 415 A.2d 47 (Pa. 1980).

159. Indeed, the word homosexual never appears, and the statute itself applies to deviate sexual intercourse, defined as "Sexual intercourse per os or per anus between human beings who are not husband and wife . . ." *Id.* at 49 n.1 (quoting 18 PA. CONST. STAT. § 301 (1973)). One is tipped off that the case addresses same sex relations from the listing of defendants (Michael Bonadio, Patrick Gagliano, Shane Wimbrel) and a reference in *Commonwealth v. Wasson*, 842 S.W.2d 487, 498 (Ky. 1993), where the Kentucky Supreme Court notes "Two states by court decisions hold homosexual sodomy statutes of this nature unconstitutional for reasons similar to those stated here: [New York and Pennsylvania]."

160. *Id.* at 51.

161. *Id.*

162. *See Onofre*, 415 N.E.2d at 936.

163. "Defendant Onofre was convicted in County Court of Onondaga County of violating

consensual sodomy between all adults, the statute applied to all acts of sodomy, regardless of the gender of the participants.<sup>164</sup> Responding to the State's argument that U.S. Supreme Court extends privacy protections "to only two aspects of sexual behavior marital intimacy and procreative choice,"<sup>165</sup> the New York court looked to *Stanley v. Georgia*<sup>166</sup> and found :

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions such as those made by defendants before us to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting.<sup>167</sup>

The court then found the consensual sodomy statute unconstitutional.

The majority opinion in *Onofre* does not discuss the ramifications of its decision as to homosexual practices, but Judge Gabrielli's dissent cautions that

[I]f the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution and homosexual marriage.<sup>168</sup>

The Kentucky Supreme Court relied heavily on *Bonadio* to find that its sodomy statute violated the privacy and equal protection provisions of the Kentucky constitution.<sup>169</sup> Struggling to break free of the grasp of *Bowers*, the court went to great lengths to establish that its case law had established a constitutional right to privacy long before the U.S. Supreme Court found similar protections in the U.S. Constitution. The court further found that the decision in

section 130.38 of the Penal Law (consensual sodomy) after his admission to having committed acts of deviate sexual intercourse with a 17- year-old male at defendant's home." *Id.* at 937-38.

164. N.Y. Penal Law, § 130.38 Consensual sodomy. A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

N.Y. Penal Law, § 130.00 Sex offenses; definitions of terms. The following definitions are applicable to this Article:

2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

165. *Onofre*, 415 N.E.2d at 939.

166. 394 U.S. 557 (1969).

167. *Onofre*, 415 N.E.2d at 940-41.

168. *Id.* at 505 n.3 (Gabrielli, J. dissenting).

169. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

*Bowers* was "a misdirected application of the theory of original intent."<sup>170</sup> Finally, the court noted that *Bonadio* was instructive because Pennsylvania and Kentucky share a common constitutional heritage.

Although the court conducted a thorough analysis of privacy protections under the Kentucky constitution, it is somewhat unclear exactly what is protected within the ambit of "privacy." Rather, the court established that "[t]he clear implication is that immorality in private which does not operate to the detriment of others is placed beyond the reach of state action by the guarantee of liberty in the Kentucky Constitution."<sup>171</sup> More importantly, the statute violated the Kentucky Equal Protection Clause because "many of the claimed justifications are simply outrageous,"<sup>172</sup> including the expressed concerns of pedophilia, promiscuity and public displays of sexual activity.

The Montana Supreme Court also struck down a statute that criminalized consensual sexual relations between adults of the same gender.<sup>173</sup> Relying on its constitutional provision that explicitly protects privacy,<sup>174</sup> the court found that "consenting adults expect that neither the state nor their neighbors will be cohabitants of their bedrooms."<sup>175</sup> It is interesting to note that the majority did not invoke either the federal or state Equal Protection Clauses,<sup>176</sup> but rather relies exclusively on the right to privacy. Chief Justice Turnage, concurring in result, but dissenting in the analysis, arguing that the statute would fail rationality review under Montana's Equal Protection Clause.<sup>177</sup>

Lower courts in Michigan and Tennessee have likewise found their sodomy statutes unconstitutional. The Michigan district court did so in an unpublished decision.<sup>178</sup> Presumptively, because the attorney general did not appeal that ruling, it is now binding on all state prosecutors absent future litigation that might attempt to resuscitate the sodomy statute.

In Tennessee, litigants were successful in bringing a declaratory judgment action barring the enforcement of the Homosexual Practices Act.<sup>179</sup> The challenged statute made it a class C misdemeanor for any person to engage in sexual penetration with a person of the same gender.<sup>180</sup> Sexual penetration included intercourse, cunnilingus, fellatio, anal intercourse, or any other

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170. *Id.* at 497.

171. *Id.* at 496 (citation omitted).

172. *Id.* at 501.

173. *See Gryczan v. Montana*, 942 P.2d 112 (Mont. 1997).

174. MONT. CONST. art. II, § 10 provides: Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

175. *Gryczan*, 942 P.2d at 122.

176. MONT. CONST. art. II, § 4.

177. *See id.* at 127 (Turnage, C.J., concurring in part and dissenting in part).

178. *See Michigan Organization for Human Rights v. Kelly*, No. 88-815820 (CZ) (Wayne County Circuit Court, July 9, 1990).

179. *See Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996).

180. *See TENN. CODE ANN.* § 39-13-510 (1991).

intrusion.<sup>181</sup> Once again, the court found itself shackled by *Bowers*, but looked to its constitution for increased protection of privacy rights. Unlike Kentucky, Tennessee courts did not have a long tradition of recognizing the right to privacy as embedded in their constitution. Rather, it was only four years before this challenge that the Tennessee Supreme Court recognized any right to privacy under its constitution, noting that “[a]s with other state constitutional rights having counterparts in the federal bill of rights, [ ] there is no reason to assume that there is a complete congruency.”<sup>182</sup> Relying on its Due Process clause,<sup>183</sup> coupled with its Declaration of Rights,<sup>184</sup> the court found that the act could not withstand strict scrutiny as a permissible intrusion of a fundamental right.

### *C. State Recognition of Homosexual Unions*

Perhaps more controversial, at least warranting Congressional intervention, is recognizing unions among gays and lesbians, akin to marriage in the heterosexual community. What started as a quiet case of state constitutional interpretation in Hawaii ended with a roar as Congress and individual states rushed to enact legislation that would bar any concept of reciprocity should a state recognize homosexual unions.

The Hawaii Supreme Court found that denying same sex couples the right to marry offended its Equal Protection Clause and therefore required the state to put forth a compelling interest.<sup>185</sup> In May 1991, three same sex couples applied for a marriage license and were denied. They took their challenge to the trial court, which dismissed it for failure to state a claim upon which relief could be granted. They then sought redress from the Hawaiian Supreme Court, which rejected the contention that the right to privacy includes a fundamental right to same-sex marriage, but looked to its Equal Protection clause,<sup>186</sup> which provided broader protections than its federal counterpart against discrimination based on sex. The court distinguished decisions of other jurisdictions that had refused to find the right to homosexual unions embedded in a concept of privacy and instead looked to *Loving v. Virginia* and applied equal protection analysis. Under this rubric, the state was required to put forth a compelling state interest to justify the ban

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181. See *id.* § 39-13-501(7).

182. *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992).

183. TENN. CONST. art. I, § 8 provides:

No man to be disturbed but by law. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

184. TENN. CONST. art. I, § 1 (“All power inherent in the people—Government under their control”), and Art. I, § 2 (“Doctrine of nonresistance condemned”).

185. See *Baehr v. Lewin*, 852 P.2d 33 (Haw. 1993).

186. HAW. CONST. art. I, § 5, which provides in relevant part: “No person shall . . . be denied the equal protection of the laws, or be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religions, sex, or ancestry.”

against same sex unions. Because the lower court dismissed the case on a motion for failure to state a claim, the state had not provided any justification for its statutory scheme. The Hawaiian Supreme therefore remanded the case to the trial court, asking the State to demonstrate a compelling state interest to justify its sex discrimination.

In the meantime, Congress, fearing that the Hawaiian Supreme Court would find a right to same sex marriage embedded in the Hawaiian constitution, passed the Defense of Marriage Act (DOMA),<sup>187</sup> which would deny gay marriages the full faith and credit protections guaranteed under the Federal Constitution. Therefore, even if gays and lesbians were given the right to marry in Hawaii, their unions would not have to be recognized in other American jurisdictions. Soon after Congress passed DOMA, the Hawaiian Circuit Court found that the State has failed in its burden to establish a compelling State interest. Once again, the State appealed to the Hawaii Supreme Court. While awaiting the Court's disposition, Hawaiian voters passed a constitutional amendment that prohibited same sex marriages, thereby rendering moot the original challenge. Since that time, thirty four states<sup>188</sup> have passed their own version of DOMA, providing that their states will not recognize same sex unions, even if those unions are performed legally in another jurisdiction.

The latest battleground is Vermont, where its supreme court found that the statutory definition of marriage as the "union of one man and one woman"<sup>189</sup> was offensive to the Common Benefits Clause of the Vermont Constitution.<sup>190</sup> The court looked at cases interpreting that clause and found that the court approaches challenges as "broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective."<sup>191</sup> The court was somewhat dismissive of the state's expressed argument that marriage is

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187. 1 U.S.C. 1, n.7 Definition of "marriage" and "spouse." In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person who is opposite sex who is a husband or a wife. (Added Sept. 21, 1996, P.L. 104-109, § 3(a), 110 Stat. 2419).

188. Alabama, Alaska, Arkansas, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia. See *Lambda Legal Defense and Education Fund*, *supra* note 153.

189. *Baker v. State*, 744 A.2d 864, 868 (Ut. 1999) (relying on WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1955) and BLACK'S LAW DICTIONARY (7th ed. 1999)).

190. VT. CONST. ch. 1, art. 7 provides: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part of that community.

191. *Baker*, 744 A.2d at 871.

intended solely for procreation, because

child rearing in a setting that provides both male and female role models, minimizing the legal complications of surrogacy contracts and sperm donors, bridging differences between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage laws in other states, and generally protecting marriage from destabilizing changes.<sup>192</sup>

Finding that none of these reasons passed constitutional muster, the court held "that plaintiffs are entitled under Chapter I, Article 7 of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."<sup>193</sup> The court then retained jurisdiction to permit the legislature to "consider and enact legislation consistent with the constitutional mandate described herein."<sup>194</sup> As this Article is written, the state of Vermont is holding town meetings to determine how best to effectuate the court's ruling.

Indiana has not looked to its constitution to determine whether gays and lesbians are warranted protection from discrimination. The legislature repealed Indiana's sodomy statute in 1995 and passed its own defense of marriage act in 1997.<sup>195</sup> The court has on occasion looked at child custody or marital asset awards where one party was gay or lesbian, but the court has refused to determine the constitutionality of such determinations, instead relying on principles of statutory interpretation to overrule trial courts. A review of Indiana case law reveals that there have been no state constitutional challenges to such discriminations, and in the rare case where a federal constitutional claim has been raised, the court has resolved the case on other grounds.<sup>196</sup> Although the Indiana appellate courts have repeatedly ruled that child custody determinations cannot be based solely on the homosexuality of one parent, they have done so avoiding constitutional analysis.<sup>197</sup> Similarly, these same courts have avoided constitutional analysis when striking down restrictions upon activity during

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192. *Id.* at 884 (quotations omitted).

193. *Id.* at 886.

194. *Id.* at 889.

195. See IND. CODE § 31-11-1-1 (1998). Same sex marriage prohibited

Sec. 1. (A) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

196. See, e.g., *Pryor v. Pryor*, 709 N.E.2d 374 (Ind. Ct. App. 1999) (trial court is instructed to apply best interest of the child analysis which does not presume to favor either parent); *Marlow v. Marlow*, 702 N.E.2d 733 (Ind. Ct. App. 1998) (court relied on best interests of the child rather than reaching the merits of petitioner's Fourteenth Amendment equal protection challenge).

197. See, e.g., *Stewart v. Stewart*, 521 N.E.2d 956 (Ind. Ct. App. 1988) (where non-custodial parent is infected with the HIV virus, termination of visitation rights is unsupported); *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981) ("[W]e believe the proper rule to be that homosexuality standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.").



visitation..<sup>198</sup> The Indiana Supreme Court has not granted transfer to hear any of these cases; therefore, there is no indication as to how the Indiana Supreme Court would respond to such challenges.

### CONCLUSION

The U.S. Supreme Court has taken widely divergent paths in ruling on privacy rights for reproductive decisionmaking and homosexual rights. This is largely due to the timing of the challenges and the political clout of the respective groups. Significant strides in reproductive decisionmaking were made during an activist era of the Court, whereas the only challenges to invidious discriminations against gays and lesbians women were decided by more conservative court. Likewise, reproductive decisions affect majoritarian interests, whereas discriminations against gays and lesbians have thus far not attained majoritarian status.

Fortunately, some state supreme courts have been increasingly willing to scour state constitutions to find greater privacy rights for disfavored groups. Indeed, as the U.S. Supreme Court is circumscribing federal action compelling the states to act, state courts are heeding the call to look to their own charters to increase privacy protections. It is likely that the next phase of the privacy revolution will take place on state battlegrounds. This creates obvious problems because disfavored groups will benefit more in some states than others. This in turn will provide an opportunity for the U.S. Supreme Court to breathe life into the Full Faith and Credit<sup>199</sup> and the Privileges and Immunities<sup>200</sup> Clauses of the Federal Constitution. And that, ironically, may usher in a new era of an activist court.

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198. *Compare* Pennington v. Pennington, 596 N.E.2d 305 (Ind. Ct. App. 1992) (upholding court order that restricts father's adult male friend not be present during overnight visitation with children.), *with* Teegarden v. Teegarden, 642 N.E.2d 1007 (Ind. Ct. App. 1994) (trial court did not have authority to restrict mother's homosexual behavior as condition of custody of her two children in custody dispute with stepmother following father's death, absent evidence of behavior having adverse effect upon children)

199. U.S. CONST. art. IV, § 1.

200. U.S. CONST. amend. XIV, § 1, cl. 2.

## ESSAY

### DIFFERENT STYLES AND SIMILAR VALUES: THE REFORMER ROLES OF CHARLES EVANS HUGHES AND LOUIS DEMBITZ BRANDEIS IN GAS, ELECTRIC, AND INSURANCE REGULATION

PAUL BRICKNER\*

#### INTRODUCTION

Louis Dembitz Brandeis, who served as an Associate Justice of the U.S. Supreme Court, and Charles Evans Hughes, who served as an Associate Justice of the Supreme Court (1910-1916) and as the eleventh Chief Justice of the United States (1939-1941), are rated consistently among the greatest American jurists.<sup>1</sup> Their lives portray both points of similarities and differences. Their career paths crossed not only during years they served together on the High Court, but also, indirectly, during the presidential election year of 1916. Brandeis had been an important advisor to Woodrow Wilson on economic and social matters during his successful 1912 campaign for the Presidency and during his first term in office.<sup>2</sup> Brandeis' thinking on various issues had an ongoing influence on Wilson's 1916 re-election campaign, even though Brandeis' elevation to the Court on June 5, 1916<sup>3</sup> effectively removed him from active involvement in politics. Hughes became the Republican candidate on June 10

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\* U. S. Administrative Law Judge, Cleveland, Ohio, 1981-present; Past-President, State (Ohio) Board of Education, 1989-1990; Assistant U.S. Attorney, S.D. Ohio, Columbus, 1968-69; N.D. Ohio, Cleveland, 1972-76; The Attorney-Inspector, Ohio Division of Securities, 1969-70; Appellate Military Judge, U.S. Army Court of Criminal Appeals (USAR), 1989-95; Adjunct Professor, University of Akron School of Law, teaching "Famous American Jurists," 1987-95; recipient of the 1993-94 John R. Quine Adjunct Faculty Award, University of Akron School of Law. B.A., 1962, University of Richmond; J.D., 1966, Case Western Reserve University; LL.M., 1983, Cleveland State University; doctoral candidate in history at Ohio State University. The author appreciates the many helpful suggestions and insights of Professor David Stebenne of the Department of History, Ohio State University.

1. See James E. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 462 (1983). In the team caricature Hambleton shows Brandeis playing center field, Hughes at short stop and, of course, Chief Justice Earl Warren at left field; see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 412 (3d ed. 1992).

2. See ABRAHAM, *supra* note 1, at 182.

3. See A. L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 247-50 (1964).

and resigned immediately from the Court.<sup>4</sup> Hughes narrowly lost to Wilson. Had Hughes won California and its thirteen electoral votes, instead of losing there by 3806 votes, he would have become President. Wilson so feared he might lose his bid for re-election that he wrote his Secretary of State Robert Lansing a proposal that if he lost the election, Lansing might resign allowing Wilson to appoint the President-elect as Secretary of State.<sup>5</sup> The President and Vice-President would resign, allowing Hughes to assume the Presidency a few months early and the nation to have a foreign policy that had the backing of the electorate.<sup>6</sup>

Hughes and Brandeis were known for their outstanding academic records.<sup>7</sup> They were meticulous, fastidious and studious in preparing for their regulatory undertakings by mastering the vast factual data involved in each industry.<sup>8</sup>

Both Brandeis and Hughes were middle of the road politically, although Brandeis, a Democrat, was more liberal and Hughes, a Republican, was more conservative. Their activities in their home states, in terms of regulation of the gas and insurance industries came at a time of important currents in American civilization. Socialism, viewed as a threat to many, was seen as an opportunity for some. Neither Brandeis nor Hughes considered public ownership of utilities and insurance companies as a desirable option, even though there was a widespread movement toward municipal ownership of public utilities.<sup>9</sup> For example, in 1905, the visit of Chicago's mayor-elect to New York City to speak

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4. See *id.* at 250. Warren G. Harding (Chairman, Republican National Convention, Chicago) Telegram to Hughes, June 10, 1916, Hughes MSS (Library of Congress) Reel 3, container 4. Brandeis paid a courtesy call upon each member of the Court. When he reached the Hughes residence, the presidential nominee had already departed. "In the fall of 1910, I went on the bench and had nothing to do with politics." In 1915, William Noble of Oklahoma, told Hughes that Roosevelt wished him to run for President in 1916. "I told Noble that while I appreciated Roosevelt's friendship, I was entirely out of politics and intended to stay out; that I was on the Bench and could not permit my name to be used." Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1929. Hughes MSS (Library of Congress) Reel 1-3.

5. See Woodrow W. Wilson, Shadow Lawn, New Jersey, to Robert Lansing, Washington, D.C., November 5, 1916. Hughes MSS (Library of Congress) Reel 5, container 8. This three-page letter, although striking, may be thought of as an unimportant fruit of Wilson's pre-election jitters or anxiety, rather than the product of careful and prolonged deliberation.

6. See *id.*

7. See ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN'S LIFE* 47 (1946).

8. See LEWIS PAPER, *BRANDEIS* 79 (1983); ROBERT F. WESSER, *CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK, 1905-1910*, at 29 (1967).

9. See *City Ownership*, N.Y. TIMES, Dec. 21, 1904, at 8. After noting that the "City Committee of the Citizens' Union . . . is not the Citizens' Union itself," the editorial stated, [T]his committee . . . is upon safe and firm ground in favoring the establishment of a municipal lighting plant for the lighting of streets and public buildings. It cannot yet be affirmed that the city ought to go into the gas and electric light business, but beyond doubt it is time to begin the necessary inquiry as to cost and relative advantages.

*Id.* See also ALPHEUS T. MASON, *BRANDEIS AND THE MODERN STATE* 35 (Sherman F. Mittell ed., 1936).

in support of municipal ownership of utilities was the subject of the lead story in the *New York Times*.<sup>10</sup> New York's Mayor George B. McClellan, Jr., was reported to support municipal ownership of a city light plant, but he was also quoted as providing a more qualified statement. "Only when private concerns cannot conduct a business to better advantage or with better results than the public is municipal ownership or Federal ownership practicable or advisable . . ." <sup>11</sup> Perhaps, Mayor McClellan's support of public ownership was not a matter of conviction, but merely posturing or threatening to gain an edge in the ensuing battles with the utilities over prices charged to the city.

Brandeis and Hughes could have selected several different ways to address the problems in the gas and insurance industries. Their choices, no doubt tempered by the political, economic and social realities of what could be accomplished, were dependent also on their own personal and philosophical inclinations. Both men were brilliant legal scholars, with years of experience in commercial practice. Both were skillful and persuasive writers. Both excelled at oral communication and the art of cross examination. In our adversarial system of justice, litigation is another form of sublimated human aggression. Lawyers, in general, like to fight. Both Brandeis and Hughes were classic examples of the fighting spirit of the legal profession. They were formidable advocates.<sup>12</sup> Human aggression has an obvious place on the athletic field, where subject to the rules of the game, competing teams battle for victory. The concept of sublimated human aggression in the practice of surgery has crept out into public awareness through television programs such as "Mash," where the profane expressions in the operating room are portrayed.

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10. See *Big Audience Cheers Chicago's Mayor-Elect; Judge Dunne Tells Mass Meeting of Municipal Ownership Fight; Thinks New York Is Ready*, N.Y. TIMES, Apr. 8, 1905, at 8. The meeting was sponsored by William Randolph Hearst, who supported public ownership of utilities and who was later defeated by Charles Evans Hughes in the gubernatorial election of 1906. See *id.*; see also *Municipal Ownership Wins in Chicago, Judge Dunne Elected Mayor on That Platform, His Plurality Is 24,248, Say Expert Engineers Will Survey All City's Railways—Factors That Worked Against Harlan*, N.Y. TIMES, Apr. 5, 1905, at 1. The *New York Times* carried other stories and editorials relating to municipal ownership of utilities commenting,

Quite likely a majority of the thinking voters of this town may have serious misgivings about the wisdom of committing the city very far to the principle of municipal ownership and operation of the plants and companies that serve the public. But a mere doubt will not long weigh in the balance against the known fact that the city is being "held up."

*The Gas Fight*, N.Y. TIMES, Dec. 11, 1904, at 6. See also *The Lighting Contracts*, N.Y. TIMES, Dec. 29, 1904, at 6 (mentioning "the relative costs of electric lighting in this and other cities"); *Mayor In Favor Of Municipal Light Plant, His Message Declares Present Prices Extortionate*, N.Y. TIMES, Jan. 3, 1905, at 6; *Municipal and Corporate Lighting*, N.Y. TIMES, Jan. 15, 1905, at 8; *Municipal Ownership Bookkeeping*, N.Y. TIMES, Jan. 16, 1905, at 8; *The Chicago Experiment*, N.Y. TIMES, Apr. 10, 1905, at 8.

11. *Mayor M'Clellan*, N.Y. TIMES, Jan. 2, 1905, at 8.

12. See *Mr. Justice Brandeis, at 75, Still the Fighter*, N.Y. TIMES, Nov. 8, 1931, at 1.

When they mapped out their proposed solutions to the problems found in public service industries, Hughes, who had to be persuaded to accept his leadership role in the investigative undertaking, followed his moderate Republican inclinations, while Brandeis, who sought out investigative challenges, was driven by his obsession with "the curse of bigness."<sup>13</sup> Each deserves high marks for his accomplishments. Brandeis was not an extremist. While he opposed businesses that he thought were too big, he supported the profit motive, free enterprise and, in particular, entrepreneurs and small businesses.<sup>14</sup> Moderate Republicanism, although unheralded, has spared us from the scourges of the extremes of right and left. Hughes can serve as an exemplar of this pragmatic outlook or approach that has served our country well by providing, as needed, an even keel and a balanced perspective.

While the lives and achievements, particularly the judicial careers, of these two men have been the subject of extensive scholarly attention, their endeavors in gas, electric and insurance regulation have not been closely examined.<sup>15</sup> Their efforts, both theoretical and practical, in these areas have endured and become models of modern-day administrative law. In a real sense, Brandeis and Hughes, were pioneers in the practical application of the principles of checks and balances to the modern American industrial economy.

#### I. BRANDEIS IN A NUTSHELL (1856-1941)

Born in 1856 in Louisville, Kentucky, to cultured German speaking emigrants from Bohemia, Brandeis excelled at the German and English Academy in his home town.<sup>16</sup> Brandeis' father, Adolph, had visited America during 1848 and 1849, before deciding to relocate his family.<sup>17</sup> They were part of the wave of immigrants who settled in America following the failure of the 1848 liberal revolutions in Europe. Although some, like Adolph Brandeis, had not participated in those revolutions, they chose to emigrate to America, because

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13. Joseph L. Rauh, Jr. et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 18 (1979). According to one author, it was Brandeis' "favorite subject."

14. Brandeis advised labor that socialism was no solution for their problems. See MASON, *supra* note 9, at 141. In an address delivered in 1905 before the Commercial Club of Boston, Brandeis stated, "But whatever and however strong our conviction against the extension of governmental functions may be, we shall inevitably be swept farther toward socialism unless we can curb the excesses of our financial magnates." LIFE INSURANCE: THE ABUSES AND THE REMEDIES 27 (1905).

15. See generally 1 LETTERS OF LOUIS D. BRANDEIS: (1870-1907) URBAN REFORMER (Melvin Urofsky & David W. Levy eds., 1971). A comment from the editors suggests that a description of Charles Evans Hughes in these early regulatory matters "could have been written about [Louis Dembitz Brandeis]." *Id.* at 320-21. (Brandeis letter of May 8, 1905 to Hughes thanks him for sending Brandeis a copy of the gas and electric report.)

16. See *id.* at xxvii.

17. See MASON, *supra* note 7, at 15-18.

of the reactionary political climate which was expected to follow in the wake of the failed revolutions, a climate which might be more uncomfortable for Jews than for others, and because of perceptions of better economic prospects in America as compared to depressed economic conditions in Europe, conditions which were unlikely to improve.<sup>18</sup> Adolph and Frederika settled briefly in Cincinnati and then in Madison, Indiana, where he and Frederika were married, before making Louisville their permanent home in 1851.<sup>19</sup> The family grain and produce business became a successful enterprise that both prospered and diversified.<sup>20</sup> But Brandeis' father anticipated the depth of the economic downturn that became the depression of 1873 and sold the business for that reason in July 1872.<sup>21</sup> The Brandeis family then traveled to Europe for what became an extended vacation, lasting three years.<sup>22</sup> Louis applied for admission to a school in Austria, but was rejected.<sup>23</sup> He applied in person to the Annen-Realschule in Dresden, Germany and was accepted, after quick responses to questions about his birth certificate and vaccination.<sup>24</sup> The fact that he was there, he said, proved that he had been born and the scar on his arm was proof of his vaccination.<sup>25</sup> Brandeis claimed that he had learned to think, or to create with his mind, at this school.<sup>26</sup> However, his facile answers to his interviewer in Dresden prove that he had acquired solid thinking habits before he had enrolled.

Years later, Brandeis recalled an incident involving a lost dormitory room key. He whistled to his roommate to let him into the building. The whistle brought a scolding from a policeman. Brandeis recalled, "This made me homesick. In Kentucky you could whistle! I wanted to go back to America and I wanted to study law. My uncle, the abolitionist, was a lawyer; and to me nothing else seemed really worth while."<sup>27</sup> Louis returned to America with his family in the spring of 1875,<sup>28</sup> even though his father thought he should remain in Europe to pursue an academic career.

Without having any college education, Brandeis enrolled at Harvard Law School in 1875.<sup>29</sup> To this day, his grade point average remains the highest ever recorded at that school.<sup>30</sup> His brilliance quickly became the subject of hagiographic legend. Another Harvard law student, William Cushing, wrote to his mother:

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18. *See id.* at 14.

19. *See id.* at 18-22.

20. *See id.*

21. *See id.* at 28.

22. *See id.*

23. *See id.* at 29.

24. *See id.* at 30.

25. *See id.*

26. *See MASON, supra* note 7, at 31.

27. *Id.*

28. *See id.* at 31-32.

29. *See id.* at 33.

30. *See* ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 198 (1967).



My friend Brandeis is a character in his way—one of the most brilliant legal minds they have ever had here. . . . Hails from Louisville, is not a college graduate, but has spent some years in Europe, has a rather foreign look and is currently believed to have some Jew blood in him, though you would not suppose it from his appearance—tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The professors listen to his opinions with the greatest deference. And it is generally correct. There are traditions of his omniscience floating through the school. One I heard yesterday. A man last year lost his notebook of Agency lectures. He hunted long and found nothing. His friends said: "Go and ask Brandeis—he knows everything—perhaps he will know where your notebook is." He went and asked. Said Brandeis, "Yes, go into the auditors' room, and look on the west side of the room, on the sill of the second window, and you will find your book." And it was so.<sup>31</sup>

Brandeis practiced law with his brother-in-law for a brief period of time in St. Louis, about 270 miles west of Louisville, where his sister and brother-in-law had settled.<sup>32</sup> He then returned to Boston to practice with his friend Samuel D. Warren, Jr., who ranked second in their law school class and whose prominent family operated a paper manufacturing business.<sup>33</sup> In 1890, Warren and Brandeis published in the *Harvard Law Review*, *The Right to Privacy*,<sup>34</sup> the most famous article ever published in an American law journal. Brandeis' law practice flourished. In time he became a millionaire from investments and the practice of law.<sup>35</sup>

Brandeis wrote to his father of his professional preference for litigation, "What I should prefer is some position that would give me practice in trying cases. I feel I am weak in this experience and think that with practice I could do well at it."<sup>36</sup> Brandeis was offered a teaching position at Harvard Law School, but he declined the opportunity to teach full-time.<sup>37</sup> Not long afterwards, he wrote to his brother Alfred, "and I really long for the excitement of the contest—that is a good prolonged one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter

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31. MASON, *supra* note 7, at 3.

32. *See id.* at 50.

33. *See id.* at 54.

34. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Interestingly, a volume reprinting this article and others was printed on paper manufactured by the S.D. Warren Company, a division of Scott Paper. The company was founded by the father of Brandeis' co-author and law partner. *See* Paul Brickner, *Great American Law Reviews*, 16 CAP. U. L. REV. 147, 150 (1986) (book review by Brickner of the 50 greatest American law review articles 1890-1968).

35. *See* MASON, *supra* note 7, at 3.

36. LETTERS OF LOUIS D. BRANDEIS, *supra* note 15, at 65.

37. *See* MASON, *supra* note 7, at 66-67.

skirmishes cannot afford."<sup>38</sup>

His values and orientation shifted from those one would expect of a successful Harvard Law School graduate as a result of the 1892 Homestead strike in Pennsylvania.<sup>39</sup> Thereafter, Brandeis became more of a reformer and an advocate of the progressive movement. He engaged in what today would be called "pro bono" or public service work involving consumer and public interest cases. Ethical scruples caused him to reimburse his law firm for the time he spent on his additional undertakings, time that took him away from law firm business.<sup>40</sup> These "outside" activities made him famous as "the people's lawyer,"<sup>41</sup> but like the consumerism of Ralph Nader of recent times, won him many enemies. In 1916, when Woodrow Wilson nominated Brandeis for a seat on the U. S. Supreme Court, those enemies nearly succeeded in blocking his appointment. Only the extraordinary loyalty and support of the President kept the nomination alive and led to a majority vote in the Senate, after a six-month struggle.<sup>42</sup>

As "the people's attorney," he did battle against powerful railroad, insurance, utility and savings interests. He fought for the constitutionality of legislation establishing maximum hours of employment for women and minimum wages for workers.<sup>43</sup> He was successful in one case, *Muller v. Oregon* (1908), before the Supreme Court of the United States, where he used what became known as the "Brandeis brief," which included arguments based on sociology, economics, medicine and psychology, as well as law.<sup>44</sup>

His appointment to the Supreme Court stemmed directly from his support of

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38. LETTERS OF LOUIS D. BRANDEIS, *supra* note 15, at 73.

39. See MASON, *supra* note 7, at 87.

40. See William O. Douglas, Book Review, N.Y. TIMES, July 5, 1964, at 3 (reviewing A. L. TODD, JUSTICE ON TRIAL (1964)).

41. THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 82 (1984).

42. See TODD, *supra* note 3. Todd reports that Wilson had Henry Morgenthau, a prominent and wealthy Jewish leader who had recently resigned as Ambassador to Turkey, speak with Senator Hoke Smith of Georgia, a members of the Senate Judiciary Committee. See *id.* at 229-31. Secretary of the Navy Josephus Daniels spoke to Senator Lee Slater Overman of North Carolina. See *id.* at 232-34. Wilson's son-in-law, Secretary of the Treasury William G. McAdoo exerted influence upon Senator John Knight Shields of Tennessee through other individuals. See *id.* at 238-41. The President personally spoke with Shields. See MASON, *supra* note 7, at 504.. In addition, President Wilson did a major political favor for New York's Senator James A. O'Gorman by having the American Ambassador in London intercede to stop the execution in Ireland of one of O'Gorman's constituents. See TODD, *supra* note 3, at 231. The nominee's brother, Alfred Brandeis, helped also by approaching Senator Shields indirectly through the junior Senator-elect of Tennessee. See PAPER, *supra* note 8, at 237-38. Charles W. Eliot, former President of Harvard University, weighed in with a letter in support of Brandeis. See TODD, *supra* note 3, at 235. The committee vote was 10 to 8, strictly along party lines. See PAPER, *supra* note 8, at 238.

43. TODD, *supra* note 3, at 56, 63-64.

44. *Id.* at 56-57.

Woodrow Wilson's presidential campaign and his continuing allegiance to the President during his first term.<sup>45</sup> The political payback was also based on merit. Wilson, himself a lawyer, held Brandeis in the highest esteem and fought vigorously against strong opposition to his nomination.<sup>46</sup> As an Associate Justice, Brandeis is most famous for his dissents with Justice Oliver Wendell Holmes, particularly in the free speech cases of the World War I era. His knowledge of regulatory matters was so great that he conducted a "class" one Saturday for the other justices to help them with a pending case. While his obsession with the "curse of bigness" was a driving force in his reformist activities, it also clouded his thinking. He opposed big banks, big railroads, big unions and even Dean Roscoe Pound's proposal to increase the size of Harvard Law School.<sup>47</sup>

Brandeis was a nonbeliever and thus did not observe any of his extended family's Jewish traditions. His parents were not observant and did not belong to a synagogue. Young Louis did not receive a Jewish education and did not have a bar mitzvah ceremony. When he married his cousin, Alice Goldmark, who was Jewish, the ceremony was performed by Dr. Felix Adler, a clergyman and the founder of the Ethical Culture Society denomination.<sup>48</sup> Brandeis and his wife had two daughters. Brandeis' maternal uncle, Lewis Dembitz, was a deeply religious and observant Jew and an ardent Zionist who authored a book on Jewish family religious observance, *Jewish Service in Synagogue and Home* (1898).<sup>49</sup> Louis called his uncle a "walking encyclopedia" and a "university," and was so devoted to him that he changed his middle name from David to Dembitz in his honor.<sup>50</sup> Dembitz, the abolitionist lawyer noted earlier as the object of young Brandeis' emulation, was a member of the Louisville bar, authored several important legal works, including *Dembitz on Land Titles* (1885) and *Kentucky Jurisprudence* (1890), and was a delegate to the Republican convention that nominated Lincoln.<sup>51</sup> Brandeis remembered with affection his uncle's observance of the Sabbath, but did not follow his uncle's religious example because he never felt the spark of religion in his heart.<sup>52</sup>

Brandeis became deeply involved in Zionism, after representing New York City garment workers, most of whom were Jewish, in a 1910 strike.<sup>53</sup> He continued his Zionist activities even after joining the Supreme Court. A direct influence on Brandeis' "conversion" to Zionism was a meeting with a Dutch

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45. See *id.* at 66-67.

46. See *id.* at 134-35.

47. See MELVIN I. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* 150 (1981).

48. See RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* 174-75 (1997).

49. See PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 230-31 (1984).

50. *Id.* at 230.

51. See *id.*

52. See *id.*

53. See *id.* at 232-33.

Zionist, Jacob DeHaas.<sup>54</sup> But Lewis Naftali Dembitz may have planted the seed of Zionism in his nephew's mind many years earlier.<sup>55</sup>

The influence of religion on the lives and achievements of individual justices is often difficult to discern. The values of Western religions are so similar that whether a person is raised in one denomination or another makes little difference. Indeed, a non-believer such as Brandeis will have acquired these same values, say of right and wrong, because they permeate our society and culture. Religion was not Brandeis' motivating force. His primary motivation came from his fighting spirit, a spirit shared by the bar generally.

Both Brandeis and Hughes have been described as having cold personalities. The description seems to have been accurate in regard to Brandeis. One of his law clerks reported delivering a memorandum to Brandeis early in the morning and sliding it under his apartment door.<sup>56</sup> A hand would be there, on the other side of the door, easing the paper into the apartment.<sup>57</sup> Would not a warmer justice have invited the law clerk in for an early morning cup of coffee and suggest he wait until the justice had read the memo so they could talk about it?

Brandeis' closest friend on the Court, Justice Oliver Wendell Holmes, noted in a letter to Harold Laski, the British political scientist that "Brandeis, whom many dislike, seems to me to have this quality and always gives me a glow, even though I am not sure that he wouldn't burn me at a slow fire if it were in the interest of some very possibly disinterested aim."<sup>58</sup> Professor McCraw, an historian at Harvard Business School, wrote in his Pulitzer Prize winning history on regulation, "Brandeis held himself aloof from other men."<sup>59</sup>

The absence of a warm and endearing personality has not deterred scholars from turning their attention to Brandeis and his ideas. Professor Alpheus T. Mason of Princeton published several works about Brandeis.<sup>60</sup> Brandeis' letters have appeared in five volumes, with an additional volume of his letters to Felix Frankfurter, a close associate who became a famous Harvard Law School professor and a Supreme Court justice.<sup>61</sup> Lewis Paper's study of Brandeis was reviewed in the Sunday "New York Times Book Review" section. Thomas K. McCraw, a history professor at the Harvard Business School, won the 1985 Pulitzer Prize for a history of the development of regulation of American industry

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54. *Id.* at 231-34.

55. *See id.*

56. *See* Paul A. Freund, *Mr. Justice Brandeis*, in *MR. JUSTICE 97*, 107-08 (Allison Dunham & Philip B. Kurland eds., 1956).

57. *See id.*

58. Letter from Justice Holmes to Harold J. Laski (Jan. 12, 1921), in *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935*, at 304 (Mark DeWolfe Howe ed., 1953).

59. MCCRAW, *supra* note 41, at 84.

60. *See* MASON, *supra* note 7; *BRANDEIS AND THE MODERN STATE* (1933); *THE BRANDeis WAY* (1938).

61. *See* 5 *LETTERS OF LOUIS D. BRANDeis (1921-1941): ELDER STATESMAN* (Melvin I. Urofsky & David W. Levy eds., 1978).

that centered on Brandeis and three other "prophets."<sup>62</sup> The Brandeisian bookshelf is enormous.

## II. BRANDEIS' OBSESSION WITH "THE CURSE OF BIGNESS" OR "THE FRANKENSTEIN MONSTER"

Professor McCraw addressed Brandeis' obsession with bigness and demonstrated that the Justice was wrong. Bigness is inevitable in our economic system. But its inevitability might not have been apparent at the turn of the century, when "trusts" controlled but a few industries, such as petroleum or oil. Many of our industries are now controlled by a few corporate giants, whereas in the past there had been a multitude of competitors. The automobile industry is a prime example. Once there were many manufacturers of automobiles.<sup>63</sup> Then there were the "big three": Ford, Chrysler and General Motors, three giant American manufacturers competing fiercely with their European and Asian counterparts. Now there are two, since Chrysler Corporation was subsumed into the German multi-national as Daimler-Benz-Chrysler. Brandeis would be appalled at the speed with which the banking industry is being centralized in the hands of fewer and fewer competitors. Nevertheless, McCraw writes that Brandeis' arguments remain compelling generations after he expressed them.

If we consider Brandeis' statements about the legal profession quoted earlier, we can see the tie between Brandeis' fighting spirit and his opposition to bigness. In our culture, fighting is limited by social constraints. The biblical tale of David and Goliath teaches that fighting someone larger than your self is acceptable. The expressions "big bully" and "pick on someone your own size" reinforce the concept that it is unacceptable for big boys to fight with smaller boys. The idea of a little bully makes no sense to us. At six feet in height, tall for his day, Brandeis' subconscious must have been infused with these concepts.

Brandeis saw the legal profession as a socially acceptable outlet for his fighting spirit. He wanted to be a lawyer like his uncle, the abolitionist. Surely abolitionists were fighters. He longed for the prolonged struggle of intensive litigation, not briefer skirmishes. Indeed, Brandeis is quoted as having said, "I would rather fight than eat."<sup>64</sup> When he selected which "pro bono" causes to espouse, he chose to take on the "big boys," big railroads, big utilities, big insurance companies and others. Always looking for a fight, Brandeis sought out a new cause even before the ashes had cooled on his last battleground. Indeed, his involvement in the Zionist movement might have been a variation on the

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62. MCCRAW, *supra* note 41.

63. See *Automotive Industry*, in THE ENCYCLOPEDIA OF CLEVELAND HISTORY 57 (David D. Van Tassel & John J. Grabowski eds., 2d ed. 1996) [hereinafter CLEVELAND HISTORY]. The 1909 census listed 32 automotive factories in Cleveland, employing 7000 workers, whereas the industry was not even listed as a category in 1899. See *id.* at 58. Over 80 different makes of automobiles were manufactured in Cleveland through 1931. See *id.* Cleveland was surpassed by Detroit as the premier automotive manufacturing center. See *id.*

64. LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 91 (1984).

same theme. He referred to Zionism as “tribal warfare.”<sup>65</sup> He fought bitterly with Chaim Weizmann, who later became the first President of the State of Israel.<sup>66</sup>

In his 1905 speech on insurance before the Commercial Club of Boston,<sup>67</sup> Brandeis focused on size. His talk was peppered with words such as “huge,” “great,” “powerful,” and “menace.” He emphasized the enormity of the country’s largest insurance companies, described it in disparaging terms and ignored the economic advantages that size could bring to a business. He said the “irresponsible power” of the large insurance companies had been exercised “selfishly, dishonestly and in the long run inefficiently.” He added,

“The causes which produce these rank abuses are general in their operation. The flagrant dishonesty and selfishness of the managers of the three leading New York companies are the result, not the cause, of the abuses. Men of character may, for a time, protect other companies in large part from like abuses, but the main cause of the evils disclosed lies in the system, rather than in the men.”<sup>68</sup>

By “the system,” Brandeis seemed to mean size. He seemed to feel that “the system” would compel even men of character to succumb in time to perpetuating the abuses.

His obsession with bigness interfered with his judgment on the Court. One case reveals for us how deeply Brandeis feared bigness and how this concern followed him into his advanced years. He never outgrew it. Florida imposed a higher tax on large chain stores than they did on individual stores. A drug store chain sued, claiming the tax law was unconstitutional, and the court agreed and struck down the tax on the basis of equal protection.<sup>69</sup> But Brandeis, in an impassioned dissent, said it was proper for Florida to impose greater taxes on chains, which he compared to “the Frankenstein monster”—a remarkable literary allusion,<sup>70</sup> and one that reveals the striking emotional depth the issue held for Brandeis, even in his senior years.

### III. HUGHES IN A NUTSHELL (1862-1948)

Charles Evans Hughes was born in 1862 in the upstate New York town of

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65. Letter from Louis D. Brandeis to Felix Frankfurter (Jan. 1, 1921), in 5 LETTERS, *supra* note 61, at 258. Brandeis cautioned that Justice Cardozo, who was being recruited to join the Zionist movement, would not understand its “tribal warfare.” *Id.*

66. See PAPER, *supra* note 8; TRIAL AND ERROR: THE AUTOBIOGRAPHY OF CHAIM WEIZMANN (1949).

67. LIFE INSURANCE, *supra* note 14.

68. *Id.*

69. See *Leggett Co. v. Lee*, 288 U.S. 517 (1932).

70. *Id.* at 566-67 (Brandeis, J., dissenting in part). Philippa Strum chose to edit out Brandeis’ reference to “the Frankenstein monster” in her book collecting some of Brandeis’ writings. See *BRANDEIS ON DEMOCRACY* 148 (Phillippa Strum ed., 1995).



Glens Falls, located north of Albany on the Hudson River.<sup>71</sup> His father, a Methodist minister, had emigrated from England.<sup>72</sup> His mother was largely of Dutch, English and Scotch-Irish ancestry, and her family was Baptist.<sup>73</sup> Hughes' father became a Baptist to accommodate the wishes of his wife and her family.<sup>74</sup> As a minister's son, Charles Evans Hughes acquired strong religious beliefs and values. His familial values were sometimes higher than those of the community at large. While he was in college, he wrote a paper for another student and used the money he received to purchase a pair of ice skates. Although this practice was less frowned upon then than it is today, apparently the Minister and his wife looked upon it with disfavor. On February 27, 1880, young Charles wrote to his parents from college attempting to justify his conduct.<sup>75</sup> As an adult, Hughes acquired a reputation for the highest integrity and unblemished honesty.<sup>76</sup> At the same time, he seemed not to have acquired the self-righteous attitude of a true believer. Perhaps the flexibility of his clergyman father, who changed denominations for love, helped him by example to be more result oriented and less of a doctrinaire idiologue.

Charles Evans Hughes attended Madison College, a Baptist school, which is now Colgate University.<sup>77</sup> He planned to enter the ministry, but, during his college years, decided to pursue a career in law.<sup>78</sup> He completed his undergraduate studies at another Baptist school, Brown University, where he was elected to Phi Beta Kappa in his junior year.<sup>79</sup> He graduated in 1881 at nineteen.<sup>80</sup> After college, he taught Latin, Greek, algebra and plane geometry at the Delaware Academy in Delphi in upstate New York.<sup>81</sup>

He then enrolled in law school at Columbia University, where he compiled a distinguished academic record.<sup>82</sup> Hughes graduated in 1884 and was admitted

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71. See THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 6 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter AUTOBIOGRAPHICAL NOTES].

72. See *id.* at 3-4.

73. See *id.* at 6.

74. See *id.*

75. Charles Evans Hughes, Providence, R.I., letter to mother, Feb. 27, 1880. Hughes MSS (Library of Congress) Reel 1-3.

76. Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1922. Hughes MSS (Library of Congress) Reel 1-3. Upon his nomination for President by the Republican party in June 1908, William Howard Taft approached Hughes to be his vice-presidential candidate. Hughes received a telegram from Elbert F. Baldwin, speaking for the President and Taft, which read in part, that Taft, "the party, and thousands irrespective of politics call for you, as he and the President said to me tonight, no other candidate could add such moral strength to the ticket." Hughes declined.

77. See AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 29.

78. See *id.* at 49.

79. See *id.* at 43.

80. See *id.* at 47.

81. See *id.* at 49 ff.

82. See *id.* at 55.

to practice that same year, after achieving a near perfect score on the bar examination.<sup>83</sup>

Hughes then went to New York City to engage in the private practice of law and soon earned a reputation as an outstanding younger lawyer. He left the stress of private practice to teach law school for two years at Cornell University (1891-93).<sup>84</sup> Except for those two years, he practiced law from the time he passed the bar, until he became Governor of New York in 1907.

In 1888, Hughes married Antoinette Carter, the daughter of a senior partner in the law firm where he was employed.<sup>85</sup> Their marriage was a happy one, as evidenced by little rhymes he wrote to his wife on birthdays and anniversaries.<sup>86</sup> They had one son and three daughters. His son became a lawyer and was a law clerk to Benjamin N. Cardozo. Hughes wrote letters to his son in their professional capacities that demonstrated genuine warmth and affection.<sup>87</sup> These warm family references belie any suggestion of coldness. Perhaps his unwillingness to "play ball" with and be clubby with the politicians and to engage in political dealmaking was interpreted as a sign of coldness.<sup>88</sup>

Charles Evans Hughes earned a reputation as an excellent attorney. In a 1910 congratulatory letter, Judge Cuthbert W. Pound of the New York Court of Appeals wrote, "Judge Alton B. Parker told me long before the days of the gas investigation, that no abler lawyer than yourself appeared before the Court of Appeals."<sup>89</sup> He added, "I remember the traditions of your encyclopedic memory at Cornell, which put us all to shame . . ."<sup>90</sup>

Attorney Hughes was so well regarded that he was approached in 1905 to serve as counsel for the Stevens Gas Committee, a state legislative committee investigating the gas industry. His successes there led to his appointment, almost immediately, as counsel during 1905 and 1906 for the Armstrong Insurance Committee, another New York state legislative committee.

Hughes became a famous public figure as a result of the superb job he performed as counsel for those two legislative investigations. His fame was based on his successful fights against the giants of the gas, electric and insurance industries, whose greed got the public's attention by hitting where it hurts—in the pocketbook. Hughes was perceived as fighting for the little man's hard

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83. See *id.* at xiv.

84. See *id.* at 88.

85. See *id.* at 81.

86. See Hughes MSS (Library of Congress) Reel 1-3.

87. See Charles Evans Hughes, Washington, D.C., to Charles Evans Hughes, Jr., New York, N.Y., November 19, 1925. Hughes MSS (Library of Congress) Reel 1-3.

88. Charles Evans Hughes, Washington, D.C., to Mark Sullivan, October 22, 1929. Hughes MSS (Library of Congress) Reel 1-3. "I had announced that I would not use patronage to get my bill through, but I would deal with legislation and appointments on their merits." Hughes was referring to a campaign promise he had made as a candidate for Governor of New York State.

89. Cuthbert W. Pound, Lockport, N. Y., to Charles Evans Hughes, Albany, N. Y., April 27, 1910. Hughes MSS (Library of Congress) Reel 1-3.

90. *Id.*

earned income. His reputation as a vigorous fighter for the people, and as a man of integrity and honesty, led to his nomination and election as Governor. Hughes was viewed by the public as an exceptional politician who was unlike the political bosses who often dominated the tarnished political arena. He served from 1907 to 1910, when President William Howard Taft persuaded Hughes to accept an appointment to the Supreme Court.<sup>91</sup> Taft mentioned the possibility that he might name Hughes Chief Justice, when an opening occurred.<sup>92</sup> However, Taft coveted that post for himself and he elevated the elderly Justice Edward D. White to that office, when an opening occurred just a few months afterwards.<sup>93</sup>

Hughes was drafted off the Supreme Court to be a candidate for President in 1916.<sup>94</sup> After narrowly losing that election, he returned to the practice of law in New York City (1917-1921), served as U. S. Secretary of State (1921-25), and served on international tribunals and commissions, including a period as Judge of the Permanent Court of International Justice (1928-30).<sup>95</sup> Later, Taft achieved his ambition and became Chief Justice and Hughes, in turn, succeeded him in that office in 1930.<sup>96</sup> Hughes served as Chief Justice until he retired in 1941.<sup>97</sup> He presided over the High Court during a period of divisiveness, marked by competing camps of "conservative" and "liberal" justices, and by F.D.R.'s "court packing plan."<sup>98</sup>

#### IV. PROGRESSIVISM AND GOVERNMENT REGULATION

Progressivism was a reform movement in American history that sought to check the imbalance in our economy between the desire for growth and progress and the need to protect the health, safety and standard of living of the public and workers. The insight of the great jurist Oliver Wendell Holmes, Jr., is helpful here. Holmes spoke of the law as being guided by, "the felt necessities of the times."<sup>99</sup> In much of the Nineteenth Century there was a great emphasis on growth, expansion and industrialization. These were felt to be more important than the safety of workers and passengers, which took second place in the race to build faster railroads and steamships. The tide would turn in a given industry, prompted often by a catastrophe or series of catastrophes. Professor McCraw has described how Charles Francis Adams developed the Massachusetts Railroad Commission in response, to a large extent, to a tragic railroad accident in that

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91. See Letter from William Howard Taft to Charles Evans Hughes (Apr. 27, 1910), in AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 158.

92. See *id.* at 159-60.

93. See *id.* at 169.

94. See *id.* at 180.

95. See *id.* at 185, 186, 200, 286.

96. See *id.* at 291.

97. See *id.* at 324.

98. *Id.* at 303-05.

99. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1938).

state.<sup>100</sup> Historian and Congressional librarian, Daniel J. Boorstin, has written of the massive loss of life and maiming of crew and passengers of steamships racing at ever increasing speeds on our rivers and lakes.<sup>101</sup> In the early years of the Twentieth Century tragic fires took an awful toll. In 1908, 170 children and two teachers died in a school fire in Cleveland, in what was then the small community of Collinwood.<sup>102</sup> The Memorial Branch of the Cleveland Public Library provides an important remembrance of that tragedy. In 1911, 141 young working women died in the famous Triangle Shirtwaist factory fire in New York City.<sup>103</sup> "Panic bars" and other safety devices became common place afterwards and might have prevented many or all of the deaths in these two tragedies.

Capitalism too often found expression during rapid periods of industrialization in a frontier or boom town mentality. The quest for wealth saw persons with anti-social personality traits trying to climb to the top at any cost and caring little or not at all for the rest of society, particularly those in the lower levels. Industrialization, the development of canals and railroad, gas, oil production, mining, the growth of cities, the spread of the factory system of manufacturing and other types of "progress" brought with them serious social problems. Unsanitary conditions in food and water supplies created health problems. Overcrowding in residential areas and in factories facilitated the spread of contagious diseases and multiplied the potential number of victims at risk due to fires and explosions. Excessive hours of employment were deleterious to workers, particularly children.

The progressive movement attacked these problems at several levels. Settlement houses sought to alleviate slum conditions. Reform mayors and others sought to replace political bosses with more responsive government.<sup>104</sup> Workers' compensation and other reform legislation was passed to protect employees from injury and to compensate them for injuries incurred on the job. Governors and other political figures sought to alleviate unsatisfactory living and working conditions. The published works of Jacob Riis and Upton Sinclair led the way to reform.<sup>105</sup> The heroic efforts of Jane Addams and others to alleviate suffering and poverty are remembered as important chapters in our national history.

At the national level, Theodore Roosevelt, Woodrow Wilson and Charles Evans Hughes campaigned for reform. Wilson's campaign slogan, "the new freedom," represented a classic expression of much of what progressivism meant. Louis Brandeis played a major role in drafting the economic policy proposals of

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100. See MCCRAW, *supra* note 41, at 25-31.

101. See DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 97-107 (1965).

102. See *Collinwood School Fire*, in CLEVELAND HISTORY, *supra* note 63, at 289; see also Fred McGunagle, *Horror in Collinwood; 172 Students Die in City's Worst Disaster*, PLAIN DEALER, Mar. 29, 1998, at 5D.

103. See *141 Men and Girls Die in Waist Factory Fire*, N.Y. TIMES, Mar. 26, 1911, at 1.

104. See TOM L. JOHNSON, *MY STORY* xvi-xix (1911).

105. See UPTON SINCLAIR, *THE JUNGLE* (1906); JACOB RIIS, *THE BATTLE WITH THE SLUM* (1902).

Wilson's campaign.

Some of Wilson's ideas were so simple that they hardly seemed worthy of mention in a Presidential campaign.<sup>106</sup> For example, Wilson proposed opening school houses for public discussion during summers and evenings, when not otherwise in use.<sup>107</sup> He spoke of the need to regulate public service corporations that provided transportation, light and other important functions.<sup>108</sup> They cannot, he said, be treated by traditional standards that would preclude regulation simply because they are private property.<sup>109</sup> He spoke out against fine points and obscure details in tariffs that cost the public millions of dollars.<sup>110</sup> Wilson proposed a federal Industrial Commission to check the power of monopolies and trusts and require them to "be made good."<sup>111</sup> Trusts, he contended, care more about their machinery than their employees; they do not care about clean working conditions or about working women and children.<sup>112</sup>

Wilson contended that the people wanted a free and just government, not a benevolent government.<sup>113</sup> He felt that the power of the great corporations was not inevitable and could be checked.<sup>114</sup> Big business was useful in some ways and could be more efficient, but business could become too big.<sup>115</sup>

Hughes had a difficult time countering the 1916 progressive campaign philosophy of Wilson and the highly effective slogan, "He kept us out of war."<sup>116</sup> Hughes sometimes came across as being anti-labor. In California, he spoke at an elite San Francisco club where the failure to remove anti-union signs from windows before Hughes' arrival resulted in adverse publicity.<sup>117</sup>

Hughes, however, was a part of the progressive or reform establishment. He had been drafted to run for governor, because his role as special counsel for two legislative investigative committees in the gas and insurance battles had made him a certified reformer, as well as a famous personality. He narrowly defeated William Randolph Hearst, the newspaper tycoon, who was something of a reformer and an anti-business spokesman. Hughes was the only Republican to win statewide office in that election.<sup>118</sup>

Hughes was influenced greatly by his religious upbringing and faith. Even

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106. See WOODROW WILSON, *THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE* (1913); see also MCCRAW, *supra* note 41, at 112.

107. See WILSON, *supra* note 106.

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 184.

117. See *id.*

118. See *id.* at 132.

as an adult he taught Sunday school.<sup>119</sup> The age old religious messages of love thy neighbor and help the poor and suffering were fundamental to Hughes' thinking.<sup>120</sup> Hughes was flexible enough to take different approaches to different problems. For the regulation of utilities he supported a Public Service Commission, that would have broad powers to investigate, regulate and coerce utilities and, if necessary, to compel them to comply with regulations and the law. This seems to be a middle of the road or moderate approach, which carries with it an unstated premise that people can change their ways. He did not view the gas and electric companies as a "Frankenstein monster" lacking the ability to change or be redeemed. He saw the utility situations in New York City and upstate New York as being different enough to warrant separate treatment by the Public Service Commission. The insurance industry, however, had so scandalous a record that Hughes supported detailed legislative measures. Just as Wilson wanted to require that the trusts "be made good," so Hughes felt that the insurance industry had to "be made good." Insurance, in some respects, is a precise form of business that is more amenable to detailed control.

After conducting the gas and electric industry investigations, Hughes did not propose new regulations that were directly regulatory or designed to break up or "de-consolidate" the industry into smaller units. He did not propose new legislation, noting in the "Report" that he drafted for the committee that there was "no effective remedy in general legislation."<sup>121</sup> Instead, relying on the experience of other states, he proposed a strong regulatory commission for the protection of the public through "constant and effective supervision" of the industry to "prevent a recurrence of the mischiefs revealed in this investigation."<sup>122</sup> Competent and expert personnel acting within a strong new regulatory agency would be the key.

The development of administrative agencies and administrative law was an outgrowth of the reformist need to regulate and control business and industry. Indeed, Professor Felix Frankfurter writing to Chief Justice Hughes in 1931 said, "Your address to the New York State Bar Association, in 1916, laid down the basic lines for the development of administrative law in this country, which we shall be in process of building for a good many years to come."<sup>123</sup> Hughes, Brandeis and Wilson were pioneers in regulation and administrative law. Dean Harlan F. Stone of Columbia Law School, who later became Associate Justice and Chief Justice of the Supreme Court, writing about the time of Hughes' speech referenced by Frankfurter, said,

[r]easonable legislative control of business affected with a public

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119. See MERLO J. PUSEY, 1 CHARLES EVANS HUGHES 110 (1951).

120. See *id.* at 111.

121. CHARLES E. HUGHES, REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK 95 (Apr. 1905).

122. *Id.* at 94.

123. Felix Frankfurter, Cambridge, Massachusetts to Charles Evans Hughes, TLS, March 6, 1931, Hughes MSS (Library of Congress), Reel 5, container 8.



interest, that is to say, business essentially government in character or requiring public franchises, or which constitutes a natural monopoly, has been upheld. Thus, the constitutional power to regulate all so-called public service corporations, as public carriers, public grain elevators, telephone companies, gas and electric companies, has been definitely established.<sup>124</sup>

Brandeis lacked the marked flexibility possessed by Hughes, but he was a realist and was not inflexible. Both shared more toughness than needed to succeed in law practice and in the adversarial arena of the courtroom and legislative hearings.

In 1906, Brandeis asked Hughes to comment on an article he had written on "Wage-Earners' Life Insurance."<sup>125</sup> Hughes responded by stating that the article demonstrated the evils of industrial insurance but asked for a more detailed analysis of the feasibility of Brandeis' corrective plan, because "even with such a showing I fear that conservatism would refuse to be convinced."<sup>126</sup> There appears in the published letters no other reference to their exchange of ideas. Hughes was one of a number of reformers whose opinions Brandeis solicited.<sup>127</sup> Brandeis may have learned to create with his mind in school in Germany, but Hughes had learned in America that experience is the best teacher. He was always the pragmatist who wanted to be sure that a good idea would be acceptable to the people.

#### V. CHARLES EVANS HUGHES AS COUNSEL FOR GAS AND INSURANCE INVESTIGATIVE COMMITTEES

Charles Evans Hughes was tapped to serve as counsel for the Stevens Committee to investigate the gas and electric industries in New York City for the purpose of determining whether a problem existed that needed corrective legislation.<sup>128</sup> The answers were a foregone conclusion, or almost so. The newspapers had carried stories that the gas and electric utilities in New York City were overcharging their customers, including the city itself.<sup>129</sup> Indeed, reports to that effect were the very reason the legislature began a formal inquiry.<sup>130</sup>

Tammany Hall, the powerful political establishment in New York City, had

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124. HARLAN F. STONE, *LAW AND ITS ADMINISTRATION* 140-50 (1915).

125. *Id.*

126. MASON, *supra* note 7, at 158; *see also* WESSER, *supra* note 8, at 308.

127. *See* MASON, *supra* note 7, at 158. Brandeis also sent the manuscript to William Whitman, Charles H. Jones, Robert F. Harick, George L. Barnes, Edwin H. Abbot, Judge Warren A. Reed, E.A. Filene, George S. Baldwin, and Georgia Wigglesworth. *See id.*

128. *See* PUSEY, *supra* note 119, at 133.

129. *See Gas Bills Introduced*, N.Y. TIMES, Jan. 5, 1905, at 2; *Bill for 70-cent Gas*, N.Y. TIMES, Jan. 12, 1905, at 1; *Gas Probers Chosen; Hitch Over Chairman*, N.Y. TIMES, Mar. 17, 1905, at 1; *Municipal and Corporate Lighting*, N.Y. TIMES, Jan. 15, 1905, at 8; *Odell on Cheap Gas, Controller Joins in Agitation for a 75-Cent Legal Rate*, Jan. 18, 1905, at 2.

130. *See* PUSEY, *supra* note 119, at 132.

previously blocked a municipal inquiry through its leader, Charles Murphy. The vote in the state Senate in favor of the gas inquiry was thirty-six to eighteen.<sup>131</sup> Among the minority voting nay was Senator Henry J. Coggeshall of Waterville, who complained that the state had spent more than \$300,000 on investigations during the preceding twenty years and who predicted that this inquiry, like the others, would be a failure.<sup>132</sup> Coggeshall was wrong, because both Senator Stevens, who led the committee, and Charles Evans Hughes, counsel for the committee, were men of integrity and ability. In addition, Senator Stevens was the past president of a Washington D.C. electric company.<sup>133</sup> As a result, he was knowledgeable of the industry, although in today's climate his prior experience might have been used to preclude him from the chairmanship. Hughes checked out Stevens before he accepted the appointment to see if he was the kind of person under whom he wanted to serve.<sup>134</sup> The committee's investigation was successful, because Hughes did a superb job. He had a photographic memory and put it to use in mastering the detail of the industries.<sup>135</sup> He was a well respected member of the bar but was little known outside of legal circles. His diligence and skillful performance brought him instant recognition and propelled him into the Governor's mansion in short order.

The gas and electric industries were interrelated. While some newspaper accounts and headlines spoke only of gas, the committee investigated both. Its formal title was the Joint Committee of the Senate and Assembly of the State of New York to Investigate the Gas and Electric Light Situation in the City of New York.<sup>136</sup> The testimony, published in three volumes totaling 2598 pages, included verbatim question and answers from thirty-seven witnesses.<sup>137</sup> More than 400 exhibits were received in evidence. In the days before radio and television, newspapers were more important than they are today. One front page headline of "The New York Times," April 1, 1905, read: "\$12,600,000 Discrepancy in Gas Company's Books, Difference Between Book and Taxable Value of Plants, Whiteley Can't Explain It."<sup>138</sup> Headlines like that brought the gas and electric investigation to the public's attention. Another headline reported seventeen percent earnings by the gas company, whereas a two percent market interest rate prevailed in 1904.<sup>139</sup>

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131. See *Vote A Gas Inquiry; Grady Accuses Hearst*, N.Y. TIMES, Mar. 15, 1905, at 1.

132. See *id.*

133. See PUSEY, *supra* note 119, at 133.

134. See *id.*

135. See AUTOBIOGRAPHICAL NOTES, *supra* note 71, at xv.

136. See TESTIMONY TAKEN BEFORE THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK TO INVESTIGATE THE GAS AND ELECTRIC LIGHT SITUATION IN THE CITY OF NEW YORK (1905) [hereinafter COMMITTEE TESTIMONY].

137. See *id.*

138. \$12,600,000 Discrepancy in Gas Company's Books, N.Y. TIMES, Apr. 1, 1905, at 1.

139. See *Gas Company Earns 17 Per Cent on Plant*, N.Y. TIMES, Apr. 2, 1905, at 3; *Reasons Underlying Low Interest Rates, New York's Improving Position as Financial Centre, Velocity of Circulation*, N.Y. TIMES, Apr. 9, 1905, at 16.

Hughes began his responsibilities only after insuring that he would be independent of political pressure and that he could follow the evidence wherever it led.<sup>140</sup> Senator Frederick C. Stevens, a man believed to be independent because of his great wealth, put Hughes' concerns to rest. "So I went ahead with what I found to be a task even more difficult than I had anticipated. But Senator Steven was true to his promise and I was not hindered by political interference."<sup>141</sup>

The hearings commenced on March 30, 1905 in the Aldermanic Chamber in New York's City Hall. They concluded April 27, 1905. Charles Evans Hughes, counsel for the Committee, prepared and personally delivered the recommendation to the legislature in Albany.<sup>142</sup>

Chairman Stevens opened the hearings with instructions against smoking and then read the resolution establishing the committee. The resolution began,

*"Whereas, There is general and widespread complaint in the city of New York of the prices maintained by the gas and electric lighting companies operating therein, and of the quality of the services, and;*

*Whereas, The Board of Estimate and Apportionment in December, 1902, adopted a report declaring the prices of said companies for public lighting to be unreasonable and excessive, and that the interests of the companies had been so combined as to eliminate competition, and rejected their bids for public lighting; and*

*Whereas, The same prices for electric lighting in all the boroughs and for gas lighting in all the boroughs except Manhattan and the Bronx, having been again bid for 1904, and the Commission of Water Supply, Gas and Electricity having, notwithstanding a report of the Engineer of Surface Construction that said bids were exorbitant and should be rejected, entered into contracts with said companies for services between March, 1904, and March, 1905, at the prices named in said bids; and*

*Whereas, An excessive price for lighting service in said city involves a great waste of city funds, and imposes a wrongful burden upon the taxpayers and inhabitants of the city,*

*Resolved, (if the Assembly concur), that a joint committee be appointed, consisting of three members of the Senate and four members of the Assembly, which committee shall as speedily as may be, proceed to investigate and examine into the organization and operation of the gas and electric lighting companies; the reasonableness of the charges maintained by the gas and electric lighting companies in the city of New York for services rendered the city and its inhabitants, with reference to*

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140. See PUSEY, *supra* note 119, at 133-34.

141. AUTOBIOGRAPHICAL NOTES, *supra* note 71, at 120.

142. See PUSEY, *supra* note 119, at 138.

the cost of the service and the capital actually employed therein; the conditions under which the business of the companies is conducted, with reference to competition; the quality of the service; the circumstances connected with the negotiations and execution of the city light contracts of 1904; and any other phase of the gas and electric lighting business as conducted in the city of New York deemed by the company [sic] to be germane to the purpose of such investigation; that the committee report to the Legislature as soon as possible the result of their investigation with such remedial measures as it may deem proper."<sup>143</sup>

The resolution continued by granting the committee subpoena power and support staff and funding in the amount of \$25,000.<sup>144</sup>

Senator Stevens recognized Counsel for the committee who made the briefest possible opening comment:

"Mr. Chairman, I shall not detain the committee with a preliminary statement further than to say that the first object of the inquiry will be to ascertain the organization, capitalization and the relations that exist between the companies producing and distributing gas and electric current in the city of New York. This will naturally lead to other inquiries which are within the scope of the resolution."<sup>145</sup>

The desire of Chairman Stevens to secure the services of an outstanding attorney to serve as the committee's counsel was understandable, when one considers that the names of several of the attorneys who represented the utility companies more than ninety years ago are recognizable even today as prominent in the legal profession: Shearman and Sterling for the Consolidated Gas Company, Paul D. Cravath for the Mutual Gas Company and John G. Milburn for the Empire Subway Company.<sup>146</sup> The gas and electric companies were represented by heavy hitters, whose names still echo with power through the canyons of Wall Street.

Hughes was probably wise not to make a flamboyant opening statement. There was no jury in these proceedings, except the jury of public opinion. The end result would not be a finding of guilt or innocence or a judgment for money damages. Possible remedial legislation was all that could be expected. The newspapers and public opinion were already on his side. Had he said what he

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143. COMMITTEE TESTIMONY, *supra* note 136, at 2-4. The signing of the new contract by the city had been the subject of newspaper accounts and editorial comment. *See Grout Changes Front on Light Contracts; Existence of Monopoly Admitted by Corporation Counsel*, N.Y. TIMES, Dec. 12, 1904, at 1. Under the heading, "Oakley Upholds Contracts," Oakley maintained that he was correct in entering into the contract. *The Lighting Contract*, N.Y. TIMES, Dec. 29, 1904, at 8. The editorial began, "Commissioner Oakley is making the very usual mistake of those in the wrong who realize that they have been found out, of doing too much explaining."

144. *See* COMMITTEE TESTIMONY, *supra* note 136, at 4.

145. *Id.*

146. *See id.* at 2.

expected to prove, he would have tipped off his opponents about where he was heading and would have left himself open to accusations that he had not proven all that he said the evidence would establish.

He proceeded to introduce into evidence the laws incorporating and providing for capitalization and stock of one illuminating company after another, along with increases of capitalization and articles of consolidation. Hughes was laying the foundation to hold the gas and electric companies responsible as public service corporations and to show that they had over-stated their capitalization in order to claim that their enlarged capitalization warranted greater earnings and dividends.<sup>147</sup> In the telling, it was dull, but it was necessary to establish the legal grounds for any proposed legislation. Attorney Mathewson asked to be permitted to represent Consolidated Gas in the proceeding, noting that such representation had been allowed in a 1900 investigation in Boston.<sup>148</sup>

Hughes called as his first witness Benjamin Whiteley, assistant treasurer of the Consolidated Gas Company. Mr. Whiteley was also affiliated with another gas company and three electric companies.<sup>149</sup> The interrelationship of the companies in the gas and electric business in New York City had been established at the outset. Further factual development took place.

Some of the testimony was dramatic and newsworthy. Consolidated Gas carried its plants as having a value of approximately \$40 million on its books, but reported to the tax authorities that those plants had a value of approximately \$27.3 million.<sup>150</sup> The company official on the witness stand could not explain the discrepancy.<sup>151</sup> Obviously the lesser value reported to the taxing authorities meant a smaller tax bill for the authorities.

Hughes was firm in dealing with matters during the hearing. When a witness was said to be sick, Hughes wanted a physician there to testify to his illness, not a doctor's note. He was tenacious in following up with his questioning. Despite evasive answers, he established that the city was paying \$80,000 for an electric bill that would have cost a private company only \$25,000.<sup>152</sup>

Hughes wrapped up his work with a recommendation that the legislature reduce the price of gas by law and that utilities be put under the authority of a Public Service Commission.<sup>153</sup> The commission would have broad regulatory powers and could act on complaints or of its own initiative. The commission that he envisioned would have power to examine books and records, require reports,

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147. See *id.* at 4.

148. See *id.* at 23-24.

149. See *id.* at 24-25.

150. See *id.* at.

151. See *id.* at 132-33; see also *\$12,600,000 Discrepancy In Gas Company's Books*, *supra* note 138, at 1.

152. See *id.* at 782-83.

153. See *75-Cent Gas Is Urged By Stevens Committee*, N.Y. TIMES, Apr. 29, 1905, at 1; *Gas Report Held Up by Tammany Panic* N.Y. Times, Apr. 29, 1905, at 3. The article also reported, "The price quoted for votes in the Senate by those who usually have to do with lobby funds in Albany is \$25,000 a vote, This is the highest ever quoted since Tweed's time." *Id.*

require reasonable rates, provide for the safety of employees, and even have power over the issuance and sale of securities.<sup>154</sup> This seems unusual today, because since that time most states have developed securities agencies for the regulation of the registration and sale of various types of stocks.

Hughes then departed for Europe to join his family who earlier had left for vacation. But he had another investigative committee related to the insurance industry waiting for him when he returned home. The senator in the role of Chairman was William W. Armstrong. The Joint Committee of the Senate and Assembly of the State of New York To Investigate and Examine into the Business and Affairs of Life Insurance Companies Doing Business in the State of New York conducted public hearings from September 6, 1905 through December 30, 1905.<sup>155</sup> Its testimony and recommendations filled ten volumes.<sup>156</sup> The investigation was somewhat different from Hughes' work in the gas and electric industry. Those companies provided necessities, while, as important as insurance companies are, they do not provide necessities. The nature of the insurance business makes it more amenable to predetermined rules and regulations.

The Armstrong Committee proposed remedial legislation in sixteen areas. One was lobbying and another was political contributions. One insurance company maintained a residence in Albany, the state capitol, manned by its key lobbyist. Found among the papers there were numerous notes and directions to kill or to support legislation. Other recommendations from the committee related to limitation of expenses, limitations on new business (according to the size of the company), and remedies of policy holders, including a right to resort to the courts, and the state insurance department.

## VI. BRANDEIS' THINKING IN GAS AND INSURANCE REGULATION

Brandeis' efforts in gas and insurance regulation and reform in Boston and Massachusetts lacked the official authority held by Hughes, who occupied an important position of state government. Brandeis worked with reform groups and organization. He seemed to want to make the giant corporations "be good" by compulsion or enticement. The gas companies could increase their dividends if they lowered their gas prices. He adopted that concept from London, England.

He was deeply concerned about the cost to ordinary individuals and about wasted premiums paid on policies they could not afford and had to let lapse. He proposed savings bank insurance as an alternative. In addition, he fought against over capitalization in both industries. Brandeis was less willing than Hughes to

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154. See ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES, GOVERNOR OF NEW YORK, 1906-1908, at 93, 133 (intro. by Jacob G. Schurman 1908); MANUAL PRODUCED FOR THE LEGISLATURE OF THE STATE OF NEW YORK, 1916, at 547-49 (1915).

155. See TESTIMONY TAKEN BEFORE THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK TO INVESTIGATE AND EXAMINE INTO THE BUSINESS AND AFFAIRS OF LIFE INSURANCE COMPANIES DOING BUSINESS IN THE STATE OF NEW YORK 6 (1905).

156. See *id.*



give people a chance to correct problems through regulatory agencies.

His thinking is expressed in articles, speeches and letters. His book, *Business: A Profession* and his writings to policyholders through reform committees<sup>157</sup> and public organizations<sup>158</sup> express his concerns about problems in the insurance industry. To a large extent they parallel those of the Armstrong committee. He suggested that, "Supervision alone—whether state or Federal—will not suffice to correct existing abuses in the life insurance business."<sup>159</sup>

Brandeis played a major role in establishing the Federal Trade Commission, but he failed to take charge of that new agency and put his ideas into effect. Professors Richard B. Stewart and Stephen G. Breyer discuss the FTC in their book and quote a passage on the FTC from one of Justice Brandeis' opinions.<sup>160</sup> Of course Professor Breyer had himself become an Associate Justice of the Supreme Court. Professor McCraw also addresses Brandeis and the FTC.<sup>161</sup>

### CONCLUSION

Brandeis and Hughes undertook separate work in different communities at approximately the same times. Their efforts were similar in many respects and their values were similar. But differences in their personalities led them to advance somewhat different solutions to the same problems. However, there is no right way or wrong way in these matters and both have had a long lasting impact on administrative law and regulatory agencies.

Brandeis was driven by his obsession with the "curse of bigness." Thomas K. McCraw has written, "Early in his career, Brandeis decided that big business could become big only through illegitimate means. By his frequent references to the 'curse of bigness,' he meant that bigness itself was a mark of Cain, a sign of prior sinning."<sup>162</sup> Brandeis, in holding this belief, shared this line of thinking with many ordinary people. The opinion is widespread, even today, that persons of great wealth must have gained their assets through illegal means or through inheritance from forebears who were sinners. Perhaps what Brandeis found troubling was that a significant portion of successful business leaders, politicians, lawyers, and others have anti-social personality traits that make them overemphasize monetary success and power and that often allow them to be uncaring about those in distress. Political scientists, unlike lawyers, have observed the same phenomenon in bureaucrats who seek bureaucratic survival

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157. See "Second Report to the Policy Holders of the Equitable Life Assurance Society," July 22, 1905.

158. See "Life Insurance: The Abuses and the Remedies," before the Commercial Club of Boston, Oct. 26, 1905.

159. *City Ownership*, *supra* note 9, at 19.

160. See STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 854 (2d ed. 1992).

161. See MCCRAW, *supra* note 41.

162. *Id.* at 108.

at all costs. Remaining in office becomes the all consuming passion.

Brandeis' concern is peculiar because he was himself a millionaire. But it led him to design administrative solutions that would "make them be good." He wanted legislation and programs that would be self-executing and would not depend on human intervention. After all, there were lobbyists with funds to tempt the most honest citizens. As a result, Brandeis proposed the "sliding scale" formula for gas rates. Lower your rates and you may increase your dividends. It was mechanical and required little human intervention. It would tend to prevent the spectacle that he described in a U.S. Senate hearing of an executive buying a \$500,000 jewelry item for his wife.<sup>163</sup>

Perhaps Brandeis' brushes with anti-semitism and the irrational side of prejudice made him mistrustful of human nature. Professor Strum suggests that Brandeis did not experience anti-Semitism until 1914.<sup>164</sup> However, he certainly was aware of it before then. The Cushing letter tells us that he was not open with his fellow law students at Harvard about his being Jewish.<sup>165</sup> A letter to his brother suggests his dismay at the anti-Semitism had reached a pinnacle in a Detroit athletic club, which was established with 5000 members, but allowed no Jews. History professor Stanley Cutler stated at a 1998 seminar at Michigan State University that anti-Semitism in America had been widespread until it was all but fatally weakened by the newsreel showings at movie theaters of the liberation of concentration camp inmates at the end of World War II.<sup>166</sup>

Charles Evans Hughes had greater faith in the ability of society to reform itself. He was not unaware of the baser side of humankind; he merely chose different ways to deal with it. Speaking to college students, he expressed the concerns shared by many reformists about the baser side of human nature.

Increasing prosperity tends to breed indifference and to corrupt moral soundness. Glaring inequalities in condition create discontent and strain the democratic relation. The vicious are the willing, and the ignorant are the unconscious instruments of political artifice. Selfishness and demagoguery take advantage of liberty. The selfish hand constantly seeks to control government, and every increase in governmental power, even to meet just needs, furnishes opportunity for abuse and stimulates the effort to bend it improper uses.<sup>167</sup>

Hughes was a realist. He had seen the same anti-social qualities in many that Brandeis had seen. He was more willing to rely on commissions and human

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163. See HEARING BEFORE THE COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE (1911-1912).

164. See STRUM, *supra* note 49, at 234.

165. See *supra* note 7 and accompanying text.

166. See STRUM, *supra* note 49; Paul Brickner, *Bibliographic Essay*, 54 U. CIN. L. REV. 839 (1986) (reviewing THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS [AND] ALFRED E. KAHN* (1984)).

167. CHARLES EVANS HUGHES, *CONDITIONS OF PROGRESS IN DEMOCRATIC GOVERNMENT* 7 (1910).

intervention to regulate on behalf of the public interest. In his 1916 acceptance speech of the Republican Presidential nomination, he spoke of the importance of competence, strength and expertise in of government officials in the area of foreign affairs. Interestingly, he concluded his moderately long address with four paragraphs on "Administrative Efficiency—Civil Service Laws—Budget." He began by saying, "Confronting every effort to improve conditions, is the meance of incompetent administration." Referencing his early remarks about appointments in the diplomatie service, he stated, "Democracy needs exact knowledge, special skill and thorough training of its servants." Administrative positions in our domestic service had to be filled with strong, competent and knowledgeable experts. Unlike Brandeis, he was not overly concerned with "the curse of bigness." "The curse of bigness" was Brandeis' meance, not mere "ihcompetent administration." His concern about "the menace of incompetent administration," was one that could be addressed by the careful selection of key personnel. After all, Senator Stevens had sought out Hughes as a man of competence and Hughes had checked out the Senator's credentials before undertaking to be counsel for the Joint Committee. For Brandeis there was "legalized robbery" to guard against. Instead of federal regulation, which would depend on one man, he proposed that the system of state regulation be maintained.<sup>168</sup>

Hughes pressed for a Public Service Commission in speeches at Elmira, New York on May 3, 1907. His remarkable speech in 1916 to the New York State Bar Association tells much about his outlook. This was the speech praised by Professor Frankfurter in 1931:

The doctrine that the Legislature cannot delegate its power has not been pushed so far as to make needed adaptation of legislation impossible, and reconciliation has been found in the establishment by the Legislature itself of appropriate standards governing the action of its agency. The ideal which has been presented in justification of these new agencies, and that which alone hold promise of benefit rather than of hurt to the community, is the ideal of special knowledge, flexibility, disinterestedness, and sound judgment in applying broad legislative principles that are essential to the protection of the community, and of every useful activity affected, to the intricate situations created by expanding enterprise. But mere bureaucracy—narrow, partisan, or inexpert—is grossly injurious; it not only fails of the immediate purpose of the law and is opposed to traditions which, happily, are still honored, but its failure creates a feeling of discouragement bordering on pessimism which forms the most serious obstacle to real improvements in the adjustment of governmental methods to new exigencies.<sup>169</sup>

The outlooks of Hughes and Brandeis have helped to mold the development of administrative law. Hughes' outlook and optimism may be more appealing

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168. See WESSER, *supra* note 8, at 18.

169. ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916, at 336-37 (2d ed. 1916).

and attractive, but Brandeis also was on target when he advanced law for those who had to be compelled to be good. Hughes recognized the need for compulsion, at times, but he was more willing to rely on human intervention and on skilled and competent bureaucrats to apply their expert knowledge to society's needs.

The two represent a tension in administration and regulation: how detailed do we make our legislation and regulations. Do we trust or mistrust the human side of administrators? Do we trust in the competence of administrators or do we "over regulate" to preclude less able administrators from inartfully exercising their discretion? Which approach will best prevent regulatory agencies from becoming captives of the very industries they were established to regulate?



## LECTURES

### THE IMPORTANCE OF BEING COMPARATIVE *M. Dale Palmer Professorship Inaugural Lecture*

DANIEL H. COLE\*

#### INTRODUCTION

My topic is the importance of comparative analysis—more specifically, the importance of comparative *legal* analysis *and* comparative *institutional* analysis for law students and legal scholars. These are really two distinct topics. All they have in common is the obvious point that they are both somehow “comparative.” Comparative *legal* analysis concerns the analysis of legal rules and policies across differing legal systems and cultures. Comparative *institutional* analysis concerns the analysis of alternative institutional approaches to resolving legal problems within a given system and culture. The benefit of combining these two distinct topics is that it enables me, in a single lecture, to touch on several of the otherwise disparate issues about which I write.

#### I. THE IMPORTANCE OF COMPARATIVE LEGAL ANALYSIS

Begin with the following counterintuitive proposition: *if* the primary goal of legal education is to prepare students to practice law in the United States, then the study of *other* legal systems is crucial because understanding *other* legal systems and cultures greatly enhances our understanding of our own. This is not a very controversial proposition; most people would probably assent to it, at least in theory. And yet, only small islands are set aside in the typical law school curriculum for the comparative study of law. Perhaps that’s enough. Or maybe there just is not time for more in a three-year law school course of study. However, students would become better attorneys, judges, policy-makers, and scholars if they had a fuller sense of the wealth of alternative rules, policies, and approaches to legal problem-solving.

Each student is, of course, exposed to *some* comparative legal analysis during

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\* M. Dale Palmer Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1980, Occidental College; A.M., 1981, University of Chicago; J.D., 1986, Northwestern School of Law of Lewis & Clark College; J.S.M., 1991 and J.S.D., 1996, Stanford Law School. This Article is dedicated to Professors Hal Lauter, Mike Blumm, and Lawrence Friedman, each of whom has greatly influenced my life and career. Every scholar should be so fortunate as to have three such outstanding mentors. And I am most grateful to M. Dale and Kay Palmer for their tremendous generosity.



their law school careers. In the first-year curriculum, *American* common law rules are often compared and contrasted with *English* common law rules. Students may even be taught a few Latin phrases from *Roman Law* (though only to the extent that Roman Law is somehow relevant to the study of American common law).

Still, generally speaking, the first-year curriculum is quite narrow and provincial; it leads students—perhaps even some professors—to misperceive the nature and breadth of the law and legal institutions. It is my experience that most students, by the end of their first year, believe that common law adjudication is the norm, and other approaches to legal problem-solving are deviations from that norm.<sup>1</sup> By the *end* of their law school careers, students tend to believe that Constitutional Law means *American-style* constitutional law, so that any deviation from the American approach, such as the inclusion of positive rights in constitutions, is just that: deviant. They believe that the only means of effectively securing commercial transactions is through a mechanism similar, if not identical, to that codified in Article 9 of the Uniform Commercial Code (“UCC”). And they believe that all legal rules and institutions of any value come from America, England, Rome, or (somewhat less frequently) France.

This is not to demean American constitutional law, the UCC, or the great traditions of American, English, Roman, and French jurisprudence. Nor do I intend to assert a sort of radical legal relativism, according to which all legal rules, institutions, and systems have equal value. Clearly, they do not. Some are more valuable because they are theoretically more elegant or more simple. Others are more valuable because they seem to work better in the real world; that is, they work more justly, more effectively, or more efficiently. Many are *perceived* as more valuable than others because they appeal to certain of our ideological predispositions. Yet the general lack of comparative perspective in legal education and scholarship unquestionably results in a certain myopia.

Unfortunately, we legal scholars often are shortsighted. In particular, we have trouble seeing beyond the midsection of the North American continent and Western Europe as sources of law and legal history. Let me give a couple of examples, the first of which is relatively trivial.<sup>2</sup>

If I were to ask, where does the rule of habeas corpus come from? The obvious answer is, of course—England. But that is not accurate. Clause 39 of *Magna Carta* promised habeas corpus.<sup>3</sup> But that promise was not realized in

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1. This is apparently what Christopher Columbus Langdell intended, when he developed the curriculum we use today back in the late Nineteenth Century; Langdell did not consider legislation to constitute law. See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 9-10 (1999).

2. Both examples are adapted from two previous works: Daniel H. Cole, *From Renaissance Poland to Poland's Renaissance*, 97 MICH. L. REV. 2062 (1999) [hereinafter Cole, *Renaissance Poland*]; Daniel H. Cole, *Poland's 1997 Constitution in Its Historical Context*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 [hereinafter Cole, *Poland's Constitution*].

3. See *Magna Carta* (1215) (visited May 3, 2000), *reprinted and translated at* <<http://www.bl.uk/diglib/magna-carta/magna-carta-text.html>>.

England until Parliament enacted the first Habeas Corpus Act in 1679.<sup>4</sup> By that time, however, a million or more citizens of the Polish-Lithuanian Republic had already been benefitting from a habeas corpus rule for some 250 years.

In 1433, King Jagiełło of Poland issued the Privilege of Jedlna, which proclaimed "we will not imprison anyone except if convicted by law."<sup>5</sup> This Privilege applied only to the nobility until 1791, when it was extended to townspeople.<sup>6</sup> Even before then, however, it provided broader coverage than many subsequently enacted habeas corpus laws from other countries, because the Polish-Lithuanian nobility constituted an unusually large percentage of the total population—somewhere between seven and fourteen percent.<sup>7</sup> And, in the fifteenth and sixteenth centuries, Poland-Lithuania was Europe's largest country by geography and third largest by population.<sup>8</sup> Yet, you will not read a historical treatment of habeas corpus written by an English or American legal scholar that even mentions the Polish-Lithuanian Republic.

To take a more current and more significant example, consider the recent *return* to constitutionalism in Central and Eastern Europe. I say "return" to constitutionalism because at least some Central and East European countries had long histories of constitutionalism prior to the imposition of communism after World War II. Unfortunately, many of the American constitutional law "experts" who sought to educate and advise post-communist governments about constitutional democracy apparently were unaware of this. Many of them displayed a woeful ignorance of the histories and cultures of the countries they were advising. They acted as if historical, cultural, and institutional circumstances could make no difference in the design and implementation of constitutions. Adding injury to insult, many of them charged high fees for sharing their wisdom with the supposed constitutional neophytes that they were advising.<sup>9</sup>

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4. Actually, the 1679 Habeas Corpus Act codified developments that had been taking place in the common law courts since the beginning of the seventeenth century. Before the seventeenth century, however, the purpose of the writ in England was to secure the presence of individuals for trial. See William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

5. Wenceslas J. Wagner, *Justice for All: Polish Democracy in the Renaissance Period in Historical Perspective*, in *THE POLISH RENAISSANCE IN ITS EUROPEAN CONTEXT* 127, 133 (Samuel Fiszman ed., 1988) (quoting King Jagiełło).

6. See Cole, *Renaissance Poland*, *supra* note 2, at 2069 n.29.

7. See *id.* at 2068.

8. At its largest extent, the Polish-Lithuanian Republic was approximately twice the size of France and slightly larger than European Muscovy, but its population of 11 million was somewhat smaller than France's or Muscovy's. See 1 NORMAN DAVIES, *GOD'S PLAYGROUND: A HISTORY OF POLAND* 24 (1982).

9. According to published reports, one law professor from New Jersey reportedly charged \$1500 a day for his advice (which is not to say that his advice was not worth the fee). See Susanne Sternhal, *Lawyers Live the Spirit '87 Revolution in E. Europe*, WASH. TIMES, July 4, 1991, at E1, available in LEXIS, News Library, Arcnws File.

Even prominent American jurists, such as Richard Posner and Cass Sunstein, proffered constitutional advice to the new Central and Eastern European democracies, even though they knew almost nothing about those countries' histories and cultures. Their advice was well-meaning and free of charge, but it proved to be misguided because it ignored historical, cultural, and institutional circumstances.

Judge Posner urged the newly liberated countries of Central and Eastern Europe to focus on constitutionalizing certain negative rights of universal significance, such as rights of private property, because those rights are relatively inexpensive to enforce and have relatively high social value.<sup>10</sup> Other, "more expensive" and less socially valuable rights, such as rights that protect against wrongful incarceration, he recommended, should be temporarily disregarded (or only minimally protected) until they could be better afforded.<sup>11</sup>

Judge Posner's economism about the rights of criminal defendants was never likely to receive a warm reception in a country like Poland, where habeas corpus protections had been a feature of indigenous constitutional history for more than half a millennium,<sup>12</sup> and where, under communism, the rate of incarceration was as high as 580 out of 100,000 inhabitants—three times higher than the rate of incarceration in the United States.<sup>13</sup> During the period of Martial Law (1981-83), "Tens of thousands of innocent citizens were arrested without charge. Some 10,000 were detained in forty-nine internment camps. There were reports of beatings and deaths."<sup>14</sup> Given this history, it was simply unthinkable that Poland's post-communist constitution might not include strong protections against wrongful incarceration. In Judge Posner's terms, the "costs" of *not* including such protections—in terms of constitutional legitimacy—would have been enormous.

Professor Sunstein similarly warned the new East European democracies against the dangers of constitutionalizing certain kinds of so-called "positive" rights—rights to have the government do something for you.<sup>15</sup> He thought it might be disastrous to combine traditional negative rights, such as freedom of

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10. See Richard A. Posner, *The Costs of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 TULSA L.J. 1 *passim* (1996).

11. *Id.*

12. See *supra* notes 5-8 and accompanying text.

13. See MARIA ŁOŚ, COMMUNIST IDEOLOGY, LAW AND CRIME 126 (1988).

14. NORMAN DAVIES, HEART OF EUROPE: A SHORT HISTORY OF POLAND 23-24 (1984). In 1990, I attended a talk by a Polish journalist, who was explaining the conditions of her imprisonment as a Solidarity activist during the period of Martial Law (1981-83). I was seated next to my friend, the Polish sociologist Piotr Gliški, who whispered into my ear, "I don't understand what the big deal is; everyone I know was in jail then." Even my wife, Izabela Kowalewska-Cole, who was a high school student at the time, was dragged out of her class, interrogated at police headquarters, and threatened with jail because some of her cousins were active in the then-outlawed Solidarity movement.

15. Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the New Constitutions of Post-Communist Europe*, E. EUR. CONST. REV., Winter 1993, at 35.

religion and the right of free speech, with positive rights, such as the right to free health care or the right to a healthful environment.<sup>16</sup> In contrast to Judge Posner, however, Professor Sunstein's primary concerns were legal and political rather than economic. He noted that socio-economic rights are notoriously difficult to enforce, and their lack of enforceability could demoralize society, possibly jeopardizing the perceived legitimacy of an entire constitution.<sup>17</sup> The failure to adequately implement and enforce positive rights could thus devalue supposedly more important negative rights. So, he counseled post-communist countries to focus on establishing firm liberal rights.<sup>18</sup>

As a matter of theory, I have few qualms about Professor Sunstein's advice. But one does not have to disagree with the merits of his advice to recognize that it had little chance of being followed in the countries he was advising for reasons that have to do with history, culture, and existing institutions, all of which his analysis neglected.

First, consider what the Central and Eastern European countries were trying to accomplish after the fall of communism. Most of them wanted, more than anything else, to become, once again, a part of Europe. Specifically, they wanted to join the European Union (EU). The Central and East European governments recognized, of course, that several existing EU member countries already had constitutions that combined positive and negative rights.<sup>19</sup> On the other hand, *American* constitutional law "experts" were warning them against that practice. What were they to do, follow the European examples or the Americans' advice? Not surprisingly, they emulated the European examples because that was a more likely route to obtaining their ultimate goal: inclusion in European legal and economic institutions.

It was not just the allure of Europe, however, that influenced constitution-making in the new democracies of Central and Eastern Europe. They also had their own, individual histories, cultures, and values to consider. Each post-communist country was always going to adopt a constitution reflecting those factors. And it was quite right that they should do so, even from a Posnerian economic perspective, for a constitution that ignored domestic history, culture, and values would likely prove more expensive in the long run because its legitimacy would always be suspect.<sup>20</sup> Most importantly, *none* of the post-

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16. *See id.*

17. *See id.* at 37.

18. *See id.* at 35-36.

19. Spain's 1992 Constitution, for example, guarantees the right to free education (art. 27(4)), the right to social security and unemployment compensation (art. 41), and the right to decent housing (art. 47). The Spanish Constitution is reprinted and translated at <[http://www.uni-wuerzburg.de/law/sp00000\\_.html](http://www.uni-wuerzburg.de/law/sp00000_.html)> (visited May 10, 2000). The Dutch Constitution of 1989 makes similar promises to its citizens concerning work (art. 19), health care (art. 22), welfare (art. 20), and education (art. 23), among others. The Dutch Constitution is reprinted and translated at <[http://www.uni-wuerzburg.de/law/nl00000\\_.html](http://www.uni-wuerzburg.de/law/nl00000_.html)> (visited May 10, 2000).

20. *See* Lee J. Alston, *Empirical Work in Institutional Economics: An Overview*, in *EMPIRICAL STUDIES IN INSTITUTIONAL CHANGE* 25, 25 (Lee J. Alston et al. eds., 1996) (noting the

communist countries was "starting . . . from scratch" in constitution-making as U.S. Supreme Court Justice Sandra Day O'Connor asserted in a 1995 speech.<sup>21</sup>

Consider the constitution that Poland finally adopted in 1997.<sup>22</sup> Not surprisingly, it appears to be a fairly typical modern European constitution. Yet it remains firmly rooted in Poland's indigenous history of constitutionalism. It contains all of the basic negative rights that Judge Posner and Professor Sunstein recommend, but not just because those rights were recommended by elite American law professors and judges. Notions such as freedom of speech, religious liberty, and protection of private property rights are hardly recent imports into Polish constitutional theory.

Poland first constitutionalized religious liberty in the 1573 Warsaw Confederation:

Because there is not a small dissension in our country in the matter of the Christian religion, we should like to prevent any harmful sedition that could develop among the people for this reason. What we see in other kingdoms, we promise to all on our behalf and for our successors, for eternity, under the oath, faith, honor, and our conscience, that no matter who the dissidents from the [Catholic] religion are, we shall preserve peace among us, and not shed blood for difference in religion or in Church observance. We shall not penalize ourselves for this reason by confiscation of landed estates, by punishment of honor, by imprisonment or exile. We also promise not to help in any way the authorities or officers in such a procedure. We all shall be obliged to oppose the shedding of blood, even if anyone would want to do this for a good reason, under the pretext of a decree or of any court procedure. . . .<sup>23</sup>

According to the historian James Miller, the Warsaw Confederation was the first document in world history to constitutionalize religious toleration (although Poland has often failed to live up to it).<sup>24</sup>

Strict private property rights protections were also part of Poland's pre-communist constitutional history. Poland's 1791 constitution—the world's second written constitution and Europe's first—contained the following elaborate provision concerning property rights:

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path-dependent nature of institutional change, with specific reference to Eastern Europe).

21. See Mack Reed, *Justice Urges Courts to Set Example Abroad; Judiciary: O'Connor, at Reagan Library, Says System Ought to Be Model for Emerging Democracies*, L.A. TIMES (Ventura County Edition), Aug. 30, 1995, at B1, available in LEXIS, News Library, Arcnws File.

22. POL. CONST. of 1997, 1997 DZIENNIK USTAW ("Journal of Laws") [hereinafter DZ.U.] No. 78, item 483, reprinted in English translation in 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 5.

23. The 1573 Warsaw Confederation is reprinted and translated in BASIC SOURCES RELATED TO THE HISTORY OF EASTERN AND CENTRAL EUROPE 45 (W.W. Soroka ed., 1966) (unpublished).

24. See James Miller, *The Sixteenth-Century Roots of the Polish Democratic Tradition*, in POLISH DEMOCRATIC THOUGHT 21 (M.B. Biskupski & J.S. Pula eds., 1990).

[W]e preserve and guarantee to every individual thereof [the nobility] personal liberty and security of territorial and moveable property, as they were formerly enjoyed; nor shall we even suffer the least encroachment on either by the supreme national power (on which the present form of government is established), under any pretext whatsoever, contrary to private rights, either in part, or in the whole; consequently we regard the preservation of personal security and property, as by law ascertained, to be a tie of society, and the very essence of civil liberty, which ought to be considered and respected for ever.<sup>25</sup>

This was a stronger but less broad guarantee of private property than any found in the U.S. Constitution. It was stronger because Poland's 1791 constitution recognized no right of Eminent Domain; but it was less broad because it only guaranteed the property rights of the nobility.

In addition to the traditional, liberal rights that are a common inheritance of both American and Polish constitutional history, Poland's 1997 constitution also includes several positive or socio-economic rights—the kind of rights that Judge Posner and Professor Sunstein deplore—such as the right to a safe workplace,<sup>26</sup> the right to equal access to health care,<sup>27</sup> the right to free public education,<sup>28</sup> and the right to a healthful environment.<sup>29</sup> It is important to note, however, that many of these “positive” rights also have precursors in Poland's indigenous constitutional history—and not just in its infamous communist constitution of 1952.<sup>30</sup> Poland's liberal-democratic constitution of 1921, for example, guaranteed the right to unemployment and sickness benefits, and the right to a state-funded education.<sup>31</sup>

This is not an argument in favor of including positive rights in constitutions.<sup>32</sup> The point is just that in order to understand Poland's new

25. POL. CONST. of 1791, art. II, *reprinted in* BICENTENNIAL OF THE POLISH THIRD OF MAY CONSTITUTION 1791-1991, at 7-8 (1991).

26. *See* POL. CONST. of 1997, 1997 Dz.U. art. 66.

27. *See id.* art. 68.

28. *See id.* at 70.

29. *See id.* at 74.

30. POL. CONST. (1952), 1952 Dz.U. No. 33, item 232.

31. *See* POL. CONST. (1921), 1921 Dz.U. No. 44, item 267.

32. It is worth noting, in this context, that Poland's 1997 constitution contains an innovative provision that may ameliorate, to some extent, concerns over the inclusion of positive rights in constitutions. Article 8(2) provides: “The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.” This provision effectively bifurcated Poland's constitution. Those rights—predominantly negative—that are capable of self-execution are self-executing. Other rights—predominantly positive—that require affirmative state action are explicitly made subject to legislative determination. So, with respect to civil rights and liberties, Poland has not one but two net constitutions: one, a traditional, self-executing bill of rights American-style; the other, a contemporary (European-style) collection of socio-economic entitlements, which are not directly enforceable. For a more detailed discussion of this provision, see Cole, *Poland's Constitution*,



constitution one must have a sense of Poland's indigenous constitutional history. And the same is surely true for every other country in the world. History matters; so do institutions. Constitutional rules and other legal rules do not arise and evolve in social vacuums. In order to understand the law, one must understand the social and historical context.

This is, of course, more easily said than done. It is a relatively simple matter to read the words of another country's constitution (especially after they have been translated into English); it is not so easy, however, to understand those words as the people of that country understand them. And that, I suspect, is why most scholars do not engage in comparative socio-legal analysis. It is easier to assume that institutions, history, and culture do not matter than to learn enough about them for purposes of sound comparative legal analysis. But, if the goal is truly to *compare* and understand legal systems, including our own, the effort has to be made.

## II. THE IMPORTANCE OF COMPARATIVE INSTITUTIONAL ANALYSIS

To this point, my focus has been on the performance of legal rules and policies *across* countries and cultures. I now turn to comparative *institutional* analysis, which focuses on resolving legal or social problems *within* a single country or culture through alternative institutional arrangements.

Let me begin the discussion on an appropriately negative note. According to the Nobel laureate Ronald Coase,<sup>33</sup> there are always at least three alternative mechanisms for organizing social relations (including economic activities): markets, firms, and governments. Coase observes that all of these mechanisms are "more or less failures."<sup>34</sup> Markets fail, firms fail, and governments fail. Consequently, there is no universal, first-best institutional solution to every perceived social and legal problem regardless of context. We inhabit a second-best world, in which our goal must be to structure social and economic interactions by those institutions and organizations which, in the circumstances, are least likely to fail, or are likely to fail the least.

This raises the important question of what constitutes "failure" (or success for that matter). I follow most economists (and utilitarians in general) in defining "failure" as the inability to maximize social welfare. The main reason markets, firms, and governments all fail, according to New Institutionalists, is the high cost of market transacting, intra-firm trading, and government regulation.<sup>35</sup> If our goal is to maximize social welfare, we need to focus on minimizing those costs—generically known as transaction costs—which include the costs of gathering information, negotiating, formalizing, policing, and enforcing

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*supra* note 2, at 35-36.

33. Coase received the Nobel Prize in Economic Science in 1991.

34. Ronald H. Coase, *The Regulated Industries: Discussion*, 54 AMER. ECON. REV. 194, 195 (1964).

35. See, e.g., Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), reprinted in RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 95, 114-19 (1988).

agreements or rules.<sup>36</sup>

Coase suggests that society should prefer an institutional and organizational arrangement that, in the specific case, entails the lowest transaction costs because that institutional and organizational arrangement is most likely to maximize social welfare.<sup>37</sup> Along with a few other economists who have managed to claw their way out of the dreamworld of neoclassical economic theory, Coase recognizes that transaction costs, though often minimized by the market, are sometimes minimized by firms and sometimes, though perhaps less frequently, minimized by government action (whether judicial action or legislative/regulatory action).<sup>38</sup>

For most non-economists, this is not a surprising conclusion; indeed, it is intuitive. But it is revolutionary in economic theory in a couple of distinct ways. First, it lays to rest a fundamental conclusion-*cum*-assumption of the neoclassical world view (and, by association, the Chicago School of Law and Economics): that the market is invariably the most efficient mechanism for allocating entitlements. Second, it challenges a fundamental premise of applied welfare economics: that government intervention is always an appropriate response to market failure. Under Coase's theory, because governments fail too, there is no reason to believe *ex ante* that government intervention to correct some market failure will necessarily solve more problems than it creates.<sup>39</sup> As a normative matter, if government intervention, in some case, *could* efficiently and effectively correct the market failure, then that government intervention *ought* to take place. But if it would cause more problems than it would solve, then, on the whole, society would be better off living with the market failure.<sup>40</sup>

Other economists and legal scholars have built upon Coase's foundation in a couple of different but interwoven ways. Neil Komesar, a law professor at the University of Wisconsin, focuses on questions of *organizational* choice for resolving legal problems or attaining social goals.<sup>41</sup> As a law professor, he is mainly interested in alternative forms of government action: when should a problem be resolved, or a goal be attained, by legislative action as opposed to judicial decision?

Aside from the organizational choices that Komesar and his followers study,

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36. See *id.* at 114; see also EIRIK G. FURUBOTN & RUDOLF RICHTER, INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS 44-45 (1998). Transaction costs have been estimated to constitute more than one-half of U.S. gross national product in 1970. John Joseph Wallis & Douglass C. North, *Measuring the Transaction Sector in the American Economy, 1870-1970*, in LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH 95, 120 (S.L. Engerman & R.E. Gallman eds., 1986).

37. See COASE, *supra* note 35, at 156.

38. See *id.* at 115-18.

39. See *id.* at 118.

40. See *id.* It should go without saying that governments do not act only to correct market failures, but for purposes of this discussion, I assume that they do.

41. See NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

there are also a variety of distinctly *institutional* choices, where institutions are defined as "the rules of the game;" that is, the rules that structure social relations.<sup>42</sup> These rules may be in the form of explicit laws and procedures or informal social norms of behavior. Within the realm of formal law, different legal *policies* may constitute alternative institutional means of achieving a given social goal.

In environmental policy, for example, we can choose from among several different mechanisms, each of which constitutes a distinct institutional approach and entails different organizational choices. Thus, the choice between imposing an outright ban on some polluting activity, regulating it, taxing it, or not controlling it at all, constitutes an *institutional* choice, requiring comparative analysis of the different policy options—their relative effectiveness, costs, and benefits—under inherently changeable circumstances. This kind of comparative institutional analysis, focusing on alternative "rules of the game," is closely associated with the work of another Nobel laureate, Douglass North.<sup>43</sup>

So much for the theory. Here is a concrete context for understanding how the theory works, using two examples from environmental protection: one illustrating Neil Komesar's comparative study of legal organizations and another illustrating Douglass North's comparative study of legal rules as social institutions.

Much of Professor Komesar's work is concerned with the question: which organization is better equipped to more efficiently and effectively deal with a certain issue, the courts, through common-law adjudication, or Congress, through legislation and subsidiary regulation? Applying this question to environmental protection, generally: which organization tends to be best for resolving environmental problems?

Before we can begin to answer that question, we need to define another term. What constitutes the "best"? Most economists would answer that the "best" mechanism is the most "efficient"—that mechanism that could achieve society's goal at the least overall cost or highest net benefit.<sup>44</sup> Legal scholars, too, would likely be concerned with efficiency, though not exclusively; they would more likely define the "best" by some combination of efficiency, fairness, and effectiveness. Unfortunately, many of the disagreements between scholars on issues such as environmental protection boil down to disagreements about the definition of the goal, or what constitutes the "best." I don't want to get caught up in those debates, which I consider to be unresolvable. Instead, my goal is simply to explain, using Professor Komesar's framework, why statutory law has generally come to dominate common law for dealing with environmental problems in the past thirty years. The answer, simply put, is that statutory

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42. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

43. *Id.* North received the Nobel Prize in Economic Science jointly with Robert Fogel in 1993.

44. See, e.g., Cento G. Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 BRIT. J.L. & SOC. 158, 168-69 (1980).

regulation has been a more efficient *and* effective mechanism than common law adjudication.

Here is a stylized illustration. Assume an air pollutant—let's call it smox—is known to cause harm to human health and the environment. Smox is a byproduct of many industrial activities, so it's pervasive. Virtually every medium-sized city in the country has several sources of smox emissions. Plants that emit smox, in order to be good neighbors, build tall smokestacks to place their smox emissions high into the prevailing winds, which carry them far away from the source. This avoids creating local air pollution problems. The winds carry the smox emissions hundreds of miles away. No one has any idea where the smox emissions from any given source ultimately fall from the sky. But where and when they do, the smox emissions cause health and environmental problems.

Automobiles are another major source of smox emissions. Every single car emits a very small amount of smox—too little by itself to cause any harm. But tens of thousands of cars within a thirty mile or so radius can cumulatively produce enough smox to create a local public-health threat.

One day, several residents of Indianapolis are working in their gardens, when they begin to suffer acute respiratory problems and are hospitalized—some for a few hours, others for several days. The doctors determine the cause of their respiratory problems was smox inhalation.

Assuming for the sake of the argument that this *is* a social problem—indeed, a market failure—requiring *some* government solution,<sup>45</sup> what is the best approach? Statutory regulation of smox emissions or common-law adjudication of claims arising from smox damage?

The common law approach suffers from several inherent problems. First, what is the cause of action? Does the common law provide some mechanism by which victims can sue to recover their hospital bills and lost wages? Well, assuming all of the gardeners in our hypothetical were property owners, they could sue for nuisance. But as a practical matter, they may encounter great difficulties in pursuing a nuisance claim. First and foremost, they have to be able to identify some defendant to sue, which means they have to identify the source or sources of the smox emissions that caused the harm to them. We know that it was not a local factory because their high smokestacks ensure that *their* smox emissions fall far outside of the local area. We might suspect that the source of the smox emissions was local automobile traffic, but then, whom do you sue? Can you sue every single motorist in the city of Indianapolis? And what if the smox that caused the harm *didn't* come from cars? You have to locate some source or sources, perhaps hundreds of miles away, and prove that *their* smox emissions *caused* the harm. Even if that were possible (which it often is not), it would be a very costly proposition. It might not be so bad if all those who were

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45. This is a crucial assumption because, in some cases at least, the costs of correcting the market failure by any governmental action would exceed the benefits to be gained. See COASE, *supra* note 35, at 118. A truly thorough comparative institutional analysis would have to include an assessment of the "no action" alternative.

harm by smog were willing to chip in to cover the expenses associated with proving the claim. But how likely is that?<sup>46</sup>

Let us suppose for the moment that they *could* prove their claim and prevail in court. Suppose they identified a plant in a small town in Ohio as the source of the particular smog emissions that harmed them. But that plant, it turns out, is the town's only significant employer, so that closing it down would have major repercussions on employment and the overall economy of that town and the surrounding region. However, the plant cannot afford either to abate its smog emissions or pay compensation for the harm caused. So any remedy would likely put the plant out of business. Is a common-law court institutionally well-suited to acquire the information and make the kind of *policy* judgments necessary to render a sound *public policy* decision in this case?

I have highlighted just a few of the many problems associated with a common-law solution to this kind of environmental issue, where large distances and time lags exacerbate causation-proof problems, large numbers of parties make efficient bargaining and negotiation unlikely, and the social repercussions of any solution extend beyond the nominal parties to the dispute. In other words, the transaction costs associated with common-law resolution of the smog problem are enormously high.

It is precisely because common-law remedies are perceived to be relatively inefficient mechanisms for resolving environmental problems that the field of Environmental Law has been dominated by statutory regulation over the past three decades. By the 1970s, there was a sense that pro-active regulation of pollution would be more effective, and possibly more efficient, than the case-by-case adjudication of individual common-law claims brought after the fact of harm, especially considering the sizeable causation-proof and other problems inherent to common-law adjudication.<sup>47</sup> The implication was that the transaction costs of dealing with environmental problems through statutory and regulatory means would be lower than the transaction costs of using the common law as the exclusive mechanism for correcting environmental market-failures. No one conducted a transaction-cost analysis to support this supposition. Few, if any, were so naive as to believe that political and administrative processes would be *inexpensive*. But, over the years, the regulatory approach has proven to be relatively efficient and effective at correcting environmental market failures.

A few relevant statistics bear this out. Between 1970 and 1990, the U.S.

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46. This question raises the issues of "hold-outs" and "free-riders," two forms of "strategic behavior" familiar to economists engaged in transaction cost analysis. On these forms of strategic behavior, see Peter S. Menell & Richard B. Stewart, ENVIRONMENTAL LAW AND POLICY 60-63 (1994).

47. See, e.g., Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974); James Krier, *Environmental Litigation and the Burden of Proof*, in LAW AND THE ENVIRONMENT 105 (Malcolm F. Baldwin & James K. Page, Jr. eds., 1970). On the evolution of environmental law from judicially-enforced torts to complex regulatory system, see, for example, Arnold W. Reitze, Jr., *The Legislative History of U.S. Air Pollution Control*, 36 Hous. L. REV. 679 (1999).

population grew by eighteen percent, gross national product quadrupled (in constant dollars), electricity production almost doubled, the number of automobiles in use increased by more than sixty-four percent, and total vehicle miles driven increased by seventy percent.<sup>48</sup> Despite all this growth, emissions and ambient concentration levels of *all* major air pollutants fell steadily and impressively. Between 1981 and 1990, for example, emissions of all “criteria” air pollutants fell by an average of twenty-four percent, and ambient concentration levels declined by an average of 22.6%.<sup>49</sup> The air became cleaner everywhere in the country, including in those cities with the nation’s worst air pollution problems.

In Los Angeles, between 1970 and 1990, the automobile population tripled. Meanwhile, ozone emissions in L.A., which come predominantly from cars, declined by forty percent.<sup>50</sup> Today, L.A., which still has one the country’s worst smog problems,<sup>51</sup> violates the federal smog standard less than one percent of the time.<sup>52</sup> It is clear that statutory/regulatory air pollution control has been a major success—perhaps one of the greatest successes of the welfare state. But at what cost?

Actually, the question should be, *at what benefit?*, because the Clean Air Act has, by all accounts, produced sizeable and growing net benefits for society. Indeed, the accumulated net benefits of the Act from 1970 to 1990 are conservatively estimated to exceed four *trillion* dollars.<sup>53</sup> That amounts to more than two-thirds of 1990 U.S. gross domestic product (\$5.8 trillion).<sup>54</sup> On the EPA’s *mean* estimate of net benefits of \$13.7 trillion, the Clean Air Act, between

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48. See COUNCIL ON ENVTL. QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVTL. QUALITY: THE TWENTIETH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY TOGETHER WITH THE PRESIDENT’S MESSAGE TO CONGRESS 9, 426 tbl. 1, 429 tbl. 5, 446 tbl. 17, & 452 tbl. 25 (1990).

49. See *id.* at 320-22 tbl. 39 & 323 tbl. 40.

50. See GREGG EASTERBROOK, *A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM* 182 (1995).

51. Houston recently supplanted L.A. as the city with the nation’s worst smog problem, but not because Houston’s emissions have increased; Los Angeles has simply reduced its emissions more than Houston has. See Marla Cone, *L.A. Breathes Easier as It Hands Off Smog Title; Air: Southland Pollution Fails to Reach Alert Level for First Time in 50 Years, and Houston Is New Ozone King*, L.A. TIMES, Oct. 13, 1999, at A1, available in 1999 WL 26185402. Favorable weather conditions in Los Angeles, and unfavorable weather conditions in Houston, may also have played a role. See *id.*

52. See Jerry Taylor, *Clearing the Air on Urban Smog*, WASH. TIMES, May 19, 1992, at F4, available in 1992 WL 8129129.

53. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *THE BENEFITS AND COSTS OF THE CLEAN AIR ACT, 1970-1990* ES-9 (1997).

54. GDP figures are from the U.S. Dept. of Commerce, Bureau of Economic Analysis, National Income and Product Accounts, Gross Domestic Product in Current Dollars (visited May 8, 2000) <<http://www.bea.doc.gov/bea/dn/gdplev.htm>>



1970 and 1990, saved more than two years worth of gross national product.<sup>55</sup> By that measure (and others), we can confidently conclude that the correction of market inefficiencies by statutory air pollution control laws has enhanced social welfare.<sup>56</sup>

This is not to claim that statutes are inevitably more effective and efficient than common law remedies. Surely that is not the case. Even within the field of environmental protection, there are situations in which common law adjudication is a more efficient means for resolving issues than statutory regulation (particularly in cases involving small numbers of parties and entailing few spillover effects). My purpose is merely to illustrate the explanatory value of the kind of comparative institutional analysis that Neil Komesar advocates.<sup>57</sup>

Finally, I want to illustrate the explanatory value of the kind of comparative institutional analysis that Douglass North promotes in a context that brings us full-circle back to Poland. It is an interesting quirk of history that Poland was ahead of much of the rest of the world in designing its environmental laws. I call it an "interesting quirk" because Poland, by the end of the communist era, happened to be one of the most heavily polluted countries in the world.<sup>58</sup> How could it be that such a heavily polluted country was so advanced in designing environmental laws? It just goes to show, as Roscoe Pound noted in 1910, that the law on the books is one thing; the law in action is another.<sup>59</sup>

On paper, Poland's 1980 Environmental Protection and Development Act was impressive.<sup>60</sup> Were it enacted today, many economists and policy analysts would likely hail it as a model of the so-called "New Environmental Law," which is distinguished from the *old* environmental law by its reliance on incentive-based mechanisms, such as effluent taxes, rather than traditional command-and-control regulations.<sup>61</sup> Poland's 1980 Act was one of the first environmental statutes in the world to rely primarily on a tax-based approach to pollution control. Instead of ordering all polluters to install a certain kind of technology to reduce their emissions, the Polish government allowed polluters to emit

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55. See U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 53, at ES-9.

56. See J. CLARENCE DAVIES & JAN MAZUREK, POLLUTION CONTROL IN THE UNITED STATES: EVALUATING THE SYSTEM 278 (1998) ("Taken as a whole, the benefits of the Clean Air Act seem clearly to outweigh the costs."); Alec Zacaroli, *Air Pollution: Economist Blasts EPA Cost/Benefit Report for Clean Air Act; Others Support Agency*, BNA NAT'L ENV'T DAILY, Dec. 16, 1998, available in LEXIS, BNA Nat'l Env't'l Daily File (citing economist Paul Portney for the proposition that, on any analysis, the benefits of the Clean Air Act would outweigh its costs).

57. Professor Komesar would not necessarily concur, however, in my analysis of comparative advantages of a statutory/regulatory approach to environmental protection.

58. See DANIEL H. COLE, INSTITUTING ENVIRONMENTAL PROTECTION: FROM RED TO GREEN IN POLAND 11 (1998).

59. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

60. *Ustawa z dnia 31 stycznia 1980 r. o ochronie i kształtowaniu środowiska* (Law of 31 Jan. 1980 on protection and development of the environment), 1980 DZ.U. No. 3, item 6.

61. See generally Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061 (1994).

however much they wanted, but taxed them for each unit of emissions at a price that was set to make it economically worthwhile for them to pollute less.<sup>62</sup> Additionally, Poland taxed far more polluting activities, and at much higher rates, than many subsequently enacted tax schemes in other countries.<sup>63</sup>

Effluent taxes are considered a progressive form of pollution control because they are, in theory, more efficient than traditional command-and-control measures (where the government simply orders all polluters to install a certain kind of pollution-control device). The tax-based approach reduces *compliance* costs and, it is usually assumed, the *total* costs of pollution control.<sup>64</sup>

The general presumption—favoring effluent taxes over command-and-control—often holds, but it is not invariably true. A great deal depends on the institutional and technological circumstances,<sup>65</sup> as Poland's experiences demonstrate.

Poland's 1980 Environmental Protection Act was conceived in an institutional vacuum. The government was trying to control pollution with prices (in the form of taxes) within an economic system in which prices were essentially meaningless (bearing no consistent relation to value) and irrelevant to producers, who were subject to endemic soft budget constraints; polluters were so heavily subsidized by the central government (which owned and controlled them), that pollution taxes (no matter how high) had no real effect on their profitability. Under those circumstances, a tax-based approach to pollution control could not have been effective, and was not effective in fact.<sup>66</sup>

Simply put, market mechanisms, such as effluent taxes, require efficiently functioning market institutions to be effective. The institutional framework clearly matters for determining the "best" legal-policy approach to achieving a given social goal or resolving a given legal problem.

This story has important implications, even after the fall of communism, because many places in the world continue to be plagued by inefficient or non-existent market institutions, which, as a practical matter, greatly restricts the

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62. See 1980 Dz.U. No. 3, item 6, art. 86. The initial tax rates (fees) were set in *Rozporządzenie Rady Ministrów z dnia 30 września 1980 r. w sprawie opłat za gospodarcze korzystanie ze środowiska i wprowadzanie w nim zmian* (Regulation of 30 Sept. 1980 concerning fees for the economic use and alteration of the environment), 1980 Dz.U. No. 24, item 93.

63. See COLE, *supra* note 58, at 70-71 (comparing environmental taxes in Poland and a variety of other countries in the 1980s, and concluding that no other country "imposed as many charges, covering as many resources and pollution sources, as People's Poland").

64. On the theory of environmental taxes, see, for example, J.B. OPSCHOOR & HANS B. VOS, *ECONOMIC INSTRUMENTS FOR ENVIRONMENTAL PROTECTION* (1989). The assumption that lower compliance costs entail lower total costs is fallacious, however. See generally Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887.

65. See *id.*

66. See COLE, *supra* note 58, at 71, 146-53.

utility of market-based approaches to regulation.<sup>67</sup> Yet, many American legal scholars and policy analysts, who ignore institutional and technological constraints, continue to recommend market-based approaches in virtually *all* circumstances.<sup>68</sup> Their advice, if followed, could well lead, in many cases, to *more* rather than less pollution.<sup>69</sup>

The ultimate lesson from this Coasian tale of comparative institutional analysis is that solutions to perceived social problems must take into account real-world technological and institutional constraints, constraints that can determine the comparative efficiency and effectiveness of alternative approaches to social and legal problems.

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67. See Cole & Grossman, *supra* note 64, at 906.

68. See, e.g., Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market-Based Approaches*, 19 B.C. ENVTL. AFF. L. REV. 547 (1992) (neglecting institutional and technological constraints in recommending that former Soviet Bloc countries immediately adopt market mechanisms for environmental protection, rather than command-and-control instruments).

69. Consider, for example, the institution of a tradeable permitting system in a country without advanced emissions monitoring technologies. If regulators cannot monitor point-source emissions to ensure compliance with emissions quotas, what incentive would rational, profit-maximizing firms have to comply with their quota limits?

# CONFIDENTIALITY OF PRESCRIPTION DRUG INFORMATION IN THE ERA OF COMPUTERS AND MANAGED CARE\*

## *McDonald-Merrill-Ketcham Lecture\*\**

BERNARD LO, M.D.\*\*\*

### INTRODUCTION

In 1998, an incident occurred in which certain patients' prescription information was publicly disclosed in order to advertise a new drug. This incident exemplifies the importance of confidentiality in the era of managed care and computers. In addition, the ethical concerns voiced about this incident also apply to pharmacy benefits management programs. Pharmacy benefits management companies "design, implement, and administer outpatient drug benefit programs for employers, managed care organizations, and other third party payers."<sup>1</sup> Pharmacy benefits management companies process claims for drug prescriptions, negotiate prices and rebates with drug manufacturers and institute programs to restrain the cost of prescription drug benefits.<sup>2</sup> The use of personal health information in pharmacy benefits management is particularly important because of increased pressures to control rising drug costs. This Article argues that confidentiality concerns about pharmacy benefits management include whether the goal of benefitting patients will be achieved and whether the means used to achieve that goal are appropriate. Policies should be crafted that protect confidentiality while allowing for appropriate use of personal health information in pharmacy benefits management. Sound policies should require: clear evidence of benefit to patients, an oversight committee, patient

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\*\*\* Program in Medical Ethics, the Center for AIDS Prevention Studies, and the Division of General Internal Medicine, University of California San Francisco. B.A., 1966, Harvard University; M.D., 1975, Stanford University. Supported in part by the Robert Wood Johnson Foundation Initiative on Strengthening the Patient-Provider Relationship in a Changing Health Care Environment and Center Grant MH42459 from the National Institute of Mental Health. Correspondence can be sent to author at: Room C 126, 521 Parnassus Avenue, San Francisco, CA 94143-0903, or email [bernie@medicine.ucsf.edu](mailto:bernie@medicine.ucsf.edu). I am indebted to Ann Alpers and to the members of the Health Privacy Working Group for many illuminating discussions on this topic. Julie Cantor and Claude Platten provided their outstanding research assistance.

1. Helene L. Lipton et al., *Pharmacy Benefit Management Companies: Dimensions of Performance*, 20 ANN. REV. PUB. HEALTH 361, 361-62 (1999).

2. See K.A. Schulman et al., *The Effect of Pharmaceutical Benefits Managers: Is It Being Evaluated?*, 124 ANNALS INTERNAL MED. 906-13 (1996).

authorization, disclosure or prohibition of conflicts of interest, additional safeguards for sensitive medical conditions, strong confidentiality protections, and restrictions on advertising.

A pharmacy program that made front-page news in 1998 dramatized how personal health information can be both used and abused in the era of managed care and computers. Two Washington, D.C. pharmacy chains, CVS and Giant Foods, sent patient prescription records to Elensys, a database marketing firm.<sup>3</sup> Elensys used the records to mail patients prescription refill reminders as well as information regarding new drugs. One such mailing informed patients who had purchased products for the nicotine replacement drug, bupropion,<sup>4</sup> that they might consider this new product more acceptable than other drugs that block the symptoms of nicotine withdrawal.<sup>5</sup> The pharmacy chains and Elensys were paid by drug manufacturers for these mailings. Prior to receiving these mailings, patients were unaware that their medical information was being used in this manner; although Elensys said that drug companies had no direct access to pharmacy records and that patients could opt out of the program by returning a form.<sup>6</sup> Critics objected to the program arguing that it crossed the line between medicine and marketing. In response, the president of Elensys stated, "This is good medical and good entrepreneurial [practice], which is the nice thing about it."<sup>7</sup>

Both CVS and Giant Pharmacy canceled the program after news stories elicited public outrage.<sup>8</sup> A Giant Pharmacy spokesperson said, "The customer response was extremely negative, and because of privacy concerns we decided to discontinue. . . . Our phones rang off the hook."<sup>9</sup> Ironically, the next year, the advertised product, bupropion, was shown to be more effective than other approaches to smoking cessation.<sup>10</sup>

The Elensys incident illustrates the importance of protecting personal health information contained in computerized databases. These databases contain information regarding patients' diagnoses, prescriptions, and utilization of health care services. The databases link information from many sources, such as test

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3. See Robert O'Harrow, Jr., *CVS Also Cuts Ties to Marketing Service; Like Giant, Firm Cites Privacy on Prescriptions*, WASH. POST, Feb. 19, 1998, at E1 [hereinafter O'Harrow, *CVS Also Cuts Ties*]; Robert O'Harrow, Jr., *Giant Food Stops Sharing Customer Data: Prescription-Marketing Plan Drew Complaints*, WASH. POST, Feb. 18, 1998, at A1 [hereinafter O'Harrow, *Giant Food*]; Robert O'Harrow, Jr., *Prescription Sales, Privacy Fears: CVS, Giant Share Customer Records with Drug Marketing Firm*, WASH. POST, Feb. 15, 1998, at A1 [hereinafter O'Harrow, *Prescription Sales, Privacy Fears*].

4. See O'Harrow, *Prescription Sales, Privacy Fears*, *supra* note 3, at A1.

5. See *id.*

6. See *id.*

7. *Id.*

8. See O'Harrow, *Giant Food*, *supra* note 3, at A1.

9. *Id.*

10. See Douglas E. Jocenby et al., *A Controlled Trial of Sustained-Release Bupropion, a Nicotine Patch, or Both for Smoking Cessation*, 340 NEW ENG. J. MED. 685, 690-91.

results from clinical laboratories, radiology departments, and pathology departments; discharge diagnoses from hospitals; and prescriptions from pharmacies. The electronic linking of such data provides many benefits to patients and society as a whole, including quality improvement and outcomes research.<sup>11</sup> For example, programs can warn physicians of adverse drug interactions, remind patients to refill prescriptions for chronic conditions, and identify patients who could be switched to lower-cost, equivalent drugs.<sup>12</sup>

However, computerized databases that contain personal health information also pose risks to patients. Because computer databases allow access to a large amount of information regarding individuals,<sup>13</sup> breaches of confidentiality may be more widespread with computers than with paper medical records. The Elensys case dramatizes how patients may be unaware of how their personal health information is being used.

The use of information regarding drug prescriptions is a timely topic for several reasons. First, pharmacy costs are the fastest rising sector of health expenditures, and the employment of pharmacy benefits management is an increasingly common means of controlling these expenses.<sup>14</sup> Second, as the Elensys incident illustrates, certain uses of personal information about pharmaceutical use may be considered ethically problematic. Finally, pharmacy benefits management sheds light on some important issues of federal policies regarding the confidentiality of electronic health information.

The contours of federal policy debates are well known. The Health Insurance Portability and Accountability Act required either Congress to pass health privacy legislation by August 1999 or the Secretary of Health and Human Services to establish health privacy regulations by January 2000.<sup>15</sup> Because Congress failed to act, the Secretary recommended proposed regulations in October 1999.<sup>16</sup>

The Secretary's proposed federal regulations allow health care plans, providers, and clearinghouses to use or disclose individually identifiable health information in electronic format for treatment, payment, and health care operations without individual patient authorization.<sup>17</sup> Although pharmacy benefits management is not specifically mentioned in the proposed regulations,

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11. See COMM. ON MAINTAINING PRIVACY AND SEC. IN HEALTH CARE APPLICATIONS OF THE NAT'L INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, FOR THE RECORD: PROTECTING ELECTRONIC HEALTH INFORMATION 26 (1997) [hereinafter FOR THE RECORD].

12. See Lipton et al., *supra* note 1, at 372-82.

13. See generally FOR THE RECORD, *supra* note 11.

14. See Lipton et al., *supra* note 1, at 362; Arnold J. Rosoff, *The Changing Force of Pharmacy Benefits Management: Information Technology Pursues a Grand Mission*, 42 ST. LOUIS U. L.J. 1, 1 (1998).

15. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264 (c)(2), 110 Stat. 1936, 2033 (1996).

16. See Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160-164 (1999).

17. See *id.*



patient authorization would probably not be required under these regulations because case management and disease management are generally considered treatment. Furthermore, the regulations provide that definitions of treatment and payment are to be "construed broadly."<sup>18</sup> Whether individual patient authorization should be required for pharmacy benefits management will be discussed later.

This Article begins by discussing briefly why medical confidentiality is important and how prescription information can be used by health care organizations. Next, it analyzes key ethical issues regarding the use of prescription information. Finally, this Article recommends how policies can be crafted to both protect confidentiality and still allow personal health information to be used appropriately in pharmacy benefits management.

### I. CONFIDENTIALITY OF MEDICAL INFORMATION

Professional medical ethics requires physicians to maintain confidentiality.<sup>19</sup> Indeed, state statutes may place role-specific obligations on health care providers to protect confidentiality.<sup>20</sup> Confidentiality encourages people to seek medical care and to disclose information to physicians. Furthermore, it also prevents stigma and discrimination in health insurance or employment.<sup>21</sup>

Although confidentiality is important, there are exceptions. Patients may authorize disclosure of information in some circumstances, such as to secure insurance coverage for services. Even without such patient permission, confidentiality may be overridden in a number of other circumstances. Health care providers may be required by law to report certain infectious diseases to public health officials, gunshot wounds to police, and serious threats of violence by psychiatric patients to intended victims.<sup>22</sup> These exceptions to confidentiality are ethically justified because they prevent physical harm to third parties or promote the public health.

Other exceptions to confidentiality are ethically justified because patients benefit from the efficient flow of personal health information.<sup>23</sup> For example,

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18. *Id.*

19. See generally TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 418-29 (4th ed. 1994); BERNARD LO, *RESOLVING ETHICAL DILEMMAS: A GUIDE FOR CLINICIANS* 44-55 (1995).

20. See generally Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 506-08 (1995); Health Privacy Working Group, Health Privacy Project of Georgetown University's Institute for Health Care Research and Policy, *The State of Health Privacy: An Uneven Terrain* (visited May 10, 2000) <<http://www.healthprivacy.org/resources/statereports/contents.html>>.

21. See BEAUCHAMP & CHILDRESS, *supra* note 19, at 418-29; LO, *supra* note 20, at 44-45.

22. See generally PAUL S. APPELBAUM, *ALMOST A REVOLUTION* 71-103 (1994); LO, *supra* note 19, at 44-45; Health Privacy Working Group, *supra* note 20, at 39, 40; Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence*, 273 JAMA 1781 (1995).

23. See COMM. ON REG'L HEALTH DATA NETWORKS, INST. OF MED., *HEALTH DATA IN THE*

state laws may permit disclosure of information without patient consent for the direct care of the patient; for authorization, billing, and payment for services; and for utilization review, quality control, and peer review.<sup>24</sup>

Current discussions regarding federal health privacy policies have focused on autonomy as the guiding ethical principle: confidentiality should be respected because people want control over personal health information.<sup>25</sup> However, autonomy and control as the ethical basis of confidentiality may be problematic because the need to restrain health care costs severely limits the choices people have over how their personal health information is used. Insurers who wish to restrain health expenditures need to know whether a patient is enrolled in their program, *whether* their plan covers a specific service or intervention, whether appropriate authorization has been obtained, and whether the services were actually rendered. Realistically, patients who do not release their personal health information for these purposes will either need to pay more out of pocket for care, change providers or health plans, or make special arrangements with the health care organization.<sup>26</sup> Thus, economic forces may compel patients to agree to disclose information, with little control over the conditions of disclosure or subsequent uses of the information.

Respect for persons may be a more appropriate philosophical basis for seeking authorization to disclose information than is respect for autonomy.<sup>27</sup> Even if realistic choices are limited, it shows respect to ask patients for authorization. Furthermore, respect for persons may require limits on how confidential information may be used. Setting limits can prevent harms or wrongs to patients, even if they have little realistic choice regarding the use of their personal health information. Reasonable limits might include restricting disclosure to the minimum needed to carry out the objective of a program and taking steps to minimize any harms that might arise from disclosure of information.

## II. USE OF PERSONAL INFORMATION ABOUT DRUG PRESCRIPTIONS

The term "pharmacy benefits management" covers a wide range of activities,<sup>28</sup> some of which resemble the Elensys program in ethically significant

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INFORMATION AGE: USE, DISCLOSURE, AND PRIVACY 5 (Molla S. Donaldson & Kathleen N. Lohr eds., 1994); Health Privacy Working Group, Health Privacy Project of Georgetown University's Institute for Health Care Research and Policy, *Best Principles for Health Privacy* (visited May 20, 2000) <[http://www.healthprivacy.org/latest/Best\\_Principles\\_Report.pdf](http://www.healthprivacy.org/latest/Best_Principles_Report.pdf)>.

24. See CAL. CIV. CODE, §§ 56-56.37 (Deering 1997); Health Privacy Working Group, *supra* note 20, at 22.

25. See COMM. ON REG'L HEALTH DATA NETWORKS, *supra* note 23, at 5; WILLIAM W. LAWRENCE, *PRIVACY AND HEALTH RESEARCH: A REPORT TO THE U.S. SECRETARY OF HEALTH AND HUMAN SERVICES* 1-13 (1997).

26. See Health Privacy Working Group, *supra* note 23.

27. See BEAUCHAMP & CHILDRESS, *supra* note 19, at 411.

28. Lipton et al., *supra* note 1.

ways. Some pharmacy benefits management programs are quality improvement programs, warning physicians of adverse drug interactions or underuse of beneficial drugs. Others are disease management programs, reminding patients to refill prescriptions needed for the long-term treatment of chronic diseases. Still pharmacy benefits management programs are cost-containment initiatives, switching patients to lower-cost, equivalent drugs.<sup>29</sup> Patients may be contacted about drug switches by the prescribing physician, the dispensing pharmacist, or the pharmacy benefits management program. Patients may not realize that the pharmacy benefits management program commonly prompts physicians and pharmacists to consider drug switches.

Some pharmacy benefits management projects resemble advertising because they promote products of a particular manufacturer that have no clinical advantages over alternative drugs. The primary goal of advertising is to increase the market share for the advertised product; benefit to consumers is a secondary end. Pharmacy benefits managers with ties to a drug manufacturer often promote drugs made by that manufacturer.<sup>30</sup> In one case, pharmacists were paid to switch patients from a diabetes drug that had generic competitors to another drug from the same manufacturer that had patent protection,<sup>31</sup> despite there being no evidence that the patented drug was more effective or safer. Such a switch does not benefit patients clinically; however, it increases the cost of care and may violate federal restraint of trade regulations.<sup>32</sup>

### III. ETHICAL CONSIDERATIONS IN THE USE OF PERSONAL HEALTH INFORMATION FOR PHARMACY BENEFITS MANAGEMENT

Critics of the Elensys project objected, arguing that the project's goal was self-interest rather than patient benefit, that patients did not authorize it, that third parties had access to information, and that safeguards for confidentiality were lacking. On closer examination, these criticisms may also apply to some pharmacy benefits management programs.

#### A. Benefit to Patients

The ethical guideline of beneficence may justify the use of personal health information in pharmacy benefits management. Beneficence requires physicians

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29. See Robert O'Harrow, Jr., *Plans' Access to Pharmacy Data Raises Privacy Issues; Benefit Firms Delve into Patient Records*, WASH. POST, Sept. 27, 1998, at A1; *As Drug Costs Rise, Health Plans Shift the Burden*, 10 CAPITATION MGMT. REP. 153, 154 (1997).

30. See generally Rosoff, *supra* note 14; David S. Hilzenrath, *Drug Firms Said to Pressure Doctors; Report Cites Efforts to Switch Prescriptions from Rival Products*, WASH. POST, Aug. 14, 1997, at E3; Gina Kolata, *Pharmacists Help Drug Promotions*, N.Y. TIMES, Aug. 2, 1994, at D1.

31. See Gina Kolata, *Upjohn to Repay 8 States over Drug Plan*, N.Y. TIMES, Aug. 2, 1994, at D1.

32. See Rosoff, *supra* note 14, at 39-41; Hilzenrath, *supra* note 30, at E3; Kolata, *supra* note 31, at D1.

to help patients further their important and legitimate interests.<sup>33</sup> Such interests would include avoiding adverse drug interactions, correcting underutilization of effective medications, increasing adherence to effective therapeutic or preventive regimens, and keeping the costs of care under control. However, despite its potential benefits, pharmacy benefits management may be regarded as ethically problematic. Concerns about drug switches and formulary restrictions have provided the impetus for state patient-protection legislation.<sup>34</sup> Two questions need to be addressed when assessing the benefits of pharmacy benefits management to patients.

1. *Is the Claim of a Patient Benefit Warranted?*—The Elensys program claimed to benefit patients by encouraging smoking cessation. However, at the time the program was in place, there was no rigorous evidence that the recommended product was superior to alternatives, or even equivalent to them. Thus there was little warrant for asserting that it was in the patient's clinical best interests to be informed of the drug or that the benefits of informing patients outweighed the breach of confidentiality needed to determine which patients to notify.

Overriding confidentiality cannot be justified by the mere hope or expectation that the new drug will be effective. Adequate justification would be studies that have been peer reviewed and determined to meet accepted professional standards of rigor.<sup>35</sup> Moreover, the use of personal health information is not justified retroactively if the following year a randomized controlled trial showed that the recommended product was more effective than other approaches to smoking cessation.<sup>36</sup> The justification must be attained before the breach of confidentiality occurs.

The determination that patients should be switched to another equivalent drug requires a detailed analysis of the published evidence regarding the drugs, as well as a consideration of the practical consequences of changing drugs. A common situation is changing a patient from one cholesterol-lowering drug to another of the same chemical class. Elevated levels of LDL-cholesterol are a common risk factor for heart attacks and stroke. Several drugs inhibit the enzyme 3-hydroxy-3-methdylglutaryl coenzyme A reductase, a key enzyme in

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33. See BEAUCHAMP & CHILDRESS, *supra* note 19, at 295-325.

34. See Health Policy Tracking Service of National Conference of State Legislatures, *Pharmaceuticals: Managed Care Drug Formularies* (visited May 10, 2000) <<http://www.hpts.org/hpts97/May1,2000>> (on file with *Indiana Law Review*).

35. See Gordon H. Guyatt et al., *User's Guides to the Medical Literature: II. How to Use an Article About Therapy or Prevention: A. Are the Results Valid?*, 270 JAMA 2598 (1993) [hereinafter Guyatt et al., *User's Guide IIA*]; Gordon H. Guyatt et al., *User's Guides to the Medical Literature: II. How to Use an Article About Therapy or Prevention: B. What Were the Results and Will They Help Me in Caring for My Patients?* 271 JAMA 59 (1994) [hereinafter Guyatt et al., *User's Guide IIB*]; Gordon H. Guyatt et al., *User's Guides to the Medical Literature: XVI. How to Use a Treatment Recommendations?*, 281 JAMA 1836 (1999) [hereinafter Guyatt et al., *User's Guide XVI*].

36. See Jocenby et al., *supra* note 10.

cholesterol metabolism. These drugs are effective in lowering cholesterol levels and are well tolerated by patients. A number of pharmaceutical companies manufacture brand-name drugs in this class. There is strong evidence that drugs of this type are equivalent in their ability to lower serum cholesterol levels and also to reduce the risk of heart attacks, other adverse cardiac events, and overall mortality.<sup>37</sup> However, even though the drugs in this class are generally considered equivalent from the perspective of a population of patients, switching a patient from one drug to another may entail adverse consequences for an individual patient. A patient who is doing well on one drug may suffer side effects when changed to another drugs. Furthermore, the equivalent doses of drugs cannot be determined in advance because of variation in effectiveness from patient to patient. Thus a patient who is switched to a different drug may need to have additional blood samples drawn to measure cholesterol levels and have additional office visits to adjust the dosage of new drug. Finally, some scientists argue that even if the drugs are equivalent in their ability to lower cholesterol, they may differ in other clinical effects, such as their effect on preventing clots in blood vessels.<sup>38</sup>

Patients may benefit from reduced costs of health care as well as from improved clinical outcomes resulting from products promoted by pharmacy benefits management programs. However, it may be difficult to determine the magnitude of savings that pharmacy benefits management programs yield to patients.<sup>39</sup> Drug discounts negotiated by pharmacy benefits management programs from pharmaceutical companies are business secrets. In addition, the savings from negotiated discounts may be directed to enhancing the profitability of health care organizations rather than keeping premiums and copayments affordable.<sup>40</sup>

2. *Do Financial Conflicts of Interest Undermine Benefit to Patients?*—Some critics objected to the profit motive of Elensys and the drug company,<sup>41</sup> which they contrasted with the patient-oriented beneficence of medical practice. However, the distinction between self-interest and beneficence can be blurred in a market-driven health care system. Both not-for-profit organizations and for-profit organizations need to pursue their financial self-interest and generate a favorable balance sheet. The ethical concern with pursuing self-interest while delivering health care is that some financial incentives that encourage providers to provide more efficient care also may cause them to withhold beneficial care.<sup>42</sup>

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37. See Finlay A. McAlister et al., *User's Guides to the Medical Literature: XIX. Applying Clinical Trial Results: B. Guidelines for Determining Whether a Drug Is Exerting (More Than) a Class Effect*, 282 JAMA 1371 (1999).

38. See Curt D. Furber et al., *Are Drugs Within a Class Interchangeable?*, 354 LANCET 1202, 1203 (1999).

39. See Lipton et al., *supra* note 1, at 386-88; Rosoff, *supra* note 14, at 10-24.

40. See generally R. McCarthy, *PBMs in a Jaundiced Eye*, 11 DRUG BENEFIT TRENDS 20-27 (1999).

41. See O'Harrow, *Prescription Sales, Privacy Fears*, *supra* note 3, at A1.

42. See generally MARC A. RODWIN, *MEDICINE, MONEY, AND MORALS: PHYSICIANS'*

Financial arrangements in some pharmacy benefits management plans are as ethically problematic as the direct payments for information in the Elensys program. Some pharmacy benefits managers pay pharmacists to switch a patient to a preferred drug.<sup>43</sup> These payments are allegedly for record review, patient education, and discussion with the prescribing physician. However, the pharmacist receives such payment only if a switch is made and presumably education and discussion can occur even if there is no change in drugs. Offering health care workers a bonus for specific clinical decisions affecting an individual patient is a grave conflict of interest. For physicians, such a direct incentive is considered an unethical and illegal kickback.<sup>44</sup> In contrast, financial incentives averaged over a large group of patients are regarded as acceptable because their psychological impact on the health care worker is weaker. Because incentives are pooled over a group of patients, the physician or pharmacist need not believe that their personal income is jeopardized by a decision for any particular patient. Thus they are considered more likely to override their self-interest if it is in the patient's best interest to receive the more expensive intervention.

Even when the goals of a project are laudable, its means may be problematic. Ethical concerns about the means used in pharmacy benefits management projects include authorization, access, and safeguards.

#### *B. Patients Authorization of Personal Health Information*

Many patients in the Elensys program felt wronged because they had not authorized the sale of their personal health information.<sup>45</sup> Even if they suffer no tangible physical or psychosocial harms, patients may feel wronged if confidential medical information is inappropriately disclosed. The patient may believe that the physician or health care organization has broken an implicit promise to keep personal health information confidential. Moreover, patients may feel wronged because they could not withdraw from the program before their information was accessed. Patients learned of the Elensys program only when they received a letter informing them about a new drug or the need to refill a prescription, at which point their personal health information had already been used.

If patients authorized the use of their personal health information for pharmacy benefits management, there would be few ethical concerns that they had been wronged. However, patient authorization is not generally obtained for pharmacy benefits management programs, regardless of whether the program is

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#### CONFLICT OF INTEREST (1993).

43. See Lipton et al., *supra* note 1, at 377-78; Donald P. Baker, *Virginia Bill Would Bar Cash Incentives for Persuasive Druggists*, WASH. POST, Jan. 30, 1997, at C1; Kolata, *supra* note 31, at A1.

44. See generally Stephen R. Lathom, *Regulation of Managed Care Incentive Payments to Physicians*, 22 AM. J.L. & MED. 399 (1996); Steven D. Pearson et al., *Ethical Guidelines for Physician Compensation Based on Capitation*, 339 NEW ENG. J. MED. 689 (1998).

45. See O'Harrow, *Giant Food*, *supra* note 3, at A1.



carried out within a health care organization or contracted out to external organizations. Individual patient authorization is believed to be an administrative burden, reduces the cost-effectiveness of these programs, and deters the use of such programs.<sup>46</sup>

### *C. Who Has Access to the Information?*

It is hard to imagine that patients would object if their personal physician examined their medical records to determine if they need drug refills or help with smoking cessation. When seeking care, patients choose to share information with doctors and trust them to maintain confidentiality. On the other hand, patients may not realize that physicians play a secondary role in pharmacy benefits management. Frequently drug changes under pharmacy benefits management are implemented through a letter from the physician to the patient.<sup>47</sup> The patient may incorrectly infer that the physician has personally reviewed the medical records and that no one else has done so. However, it is the pharmacy benefits management program that identifies eligible patients and prepares letters for physicians to sign if they agree with the drug change. The patient's health information has already been analyzed by the program before the physician receives the letter. Thus the physician cannot ensure that confidentiality has been maintained in this process of identifying patients to be contacted.

The Elensys episode illustrates how the issue of who has access to personal health information is intertwined with why they have access. Pharmacy chains and pharmacy benefit managers need to access personal health information when dispensing medications, in order to determine whether the patient is allergic to a prescribed drug, has a medical contraindication to the drug, or is taking another drug that interacts with it in an adverse manner. It also is appropriate for pharmacy benefits management programs and pharmacies to have access to personal health information for billing and payment, quality improvement, disease management, and cost containment. In contrast, there is little warrant for these organizations to access identifiable clinical information to advertise products that are not known to be better than alternatives, unless the patient has already given permission to access records for this purpose.

In a similar manner, employers may justifiably have access to personal health information for some purposes but not others. Self-insured employers need to have prescription information in order to pay for prescription drug benefits and to ensure that billed services have actually been delivered. However, employers should not have access to personal health information when making personnel decisions.<sup>48</sup> Employees may be concerned that firewalls are inadequate to prevent the benefits division of the company from passing personal health information to the personnel department. Concerns about confidentiality are

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46. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264(c)(2), 110 Stat. 1936, 2033 (1996).

47. See Lipton et al., *supra* note 1, at 377.

48. See Rosoff, *supra* note 14, at 29-32.

particularly troubling with regard to prescription information because employers who provide health benefits often hire pharmacy benefits management firms to manage drug benefits.<sup>49</sup>

Patients in the Elensys program objected that third parties whom they did not know had access to their personal health information. However, the involvement of third parties may be needed for a pharmacy benefits management program to work effectively. Some pharmacy benefits organizations lack the expertise to identify individual patients for direct mailings. Such programs may contract with an external service organization which has expertise in analyzing computerized databases.<sup>50</sup> However, patients may fear that these service organizations fail to safeguard confidentiality, as we next discuss.

#### *D. Safeguards for Maintaining Confidentiality?*

Safeguards reduce the risks of projects that use personal health information. Recent reviews discuss in detail how confidentiality may not be adequately protected.<sup>51</sup> Several problems have been identified. First, state confidentiality statutes and case law may apply specifically to health care providers,<sup>52</sup> but not to data management firms who do not clearly fall within the definitions of "health care providers."<sup>53</sup> After the Elensys incident, uncertainty over the applicability of state laws prompted state legislators in Maryland and Virginia to introduce bills to strengthen confidentiality of pharmacy records.<sup>54</sup> Second, statutes usually concern disclosure of personal health information by health care providers to third parties and not the use of information within a health care organization.<sup>55</sup> However, breaches of confidentiality within an organization may cause harm or wrong to patients, as well as disclosures to third parties. Third, technical measures and legal protections to safeguard computerized health information may be inadequate.<sup>56</sup> In theory, electronic personal health information can be more tightly protected than paper records through the use of such measures as password protection, audit trails that keep a record of all persons who have accessed a patient's record, and automatic logoff from the database if a remote terminal has not been used for a set period of time.<sup>57</sup> However, health care

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49. See Lipton et al., *supra* note 1, at 368.

50. See *id.* at 363.

51. See Janlori Goldman, *Protecting Privacy to Improve Health Care*, HEALTH AFFAIRS, Nov./Dec. 1998, at 47; Gostin, *supra* note 20, at 451-528; Health Privacy Working Group, *supra* note 20.

52. See CAL. CIV. CODE §§ 56-56.37 (Deering 1997). See generally Gostin, *supra* note 20; Health Privacy Working Group, *supra* note 21.

53. See Baker, *supra* note 43, at C1; Ralph Jimenez, *Bill Would Ban Raids on Rx Records*, BOSTON GLOBE, June 14, 1998, (New Hampshire Weekly), at 1.

54. See O'Harrow, *Prescription Sales, Privacy Fears*, *supra* note 3, at A1.

55. See Health Privacy Working Group, *supra* note 20, at 17.

56. See *id.*; FOR THE RECORD, *supra* note 11, at 122-26.

57. See FOR THE RECORD, *supra* note 11, at 82-111.

organizations often do not use these measures to safeguard confidentiality, even though they are technically feasible to implement.<sup>58</sup>

The debates over federal health privacy legislation or regulation offer an opportunity to craft policies that can both protect confidentiality and allow the use of personal health information in appropriate pharmacy benefits management programs.

#### IV. RECOMMENDATIONS FOR USING PERSONAL HEALTH INFORMATION IN PHARMACY BENEFITS MANAGEMENT

There are strong policy reasons to identify adverse drug reactions, prescribing errors, and underuse of beneficial drugs, to enhance patient adherence and to restrain increases in prescription costs.<sup>59</sup> Thus, quality improvement, disease management, and cost containment are praiseworthy goals for pharmacy benefits management. However, the means used to achieve these goals must also be appropriate. In this section, this Article recommends guidelines for allowing personal health information to be used for such purposes. These recommendations go beyond the proposed regulations of the Department of Health and Human Services in requiring clear evidence of benefit to patients, an oversight committee, patient authorization, disclosure or prohibition of conflicts of interest, and additional safeguards for sensitive medical conditions.

##### *A. Strong Evidence of Benefit to Patients*

Benefit to patients is a necessary condition for using personal health information in pharmacy benefits management. Ethically, the guidelines of beneficence and nonmaleficence can provide a strong warrant for using personal health information. However, there are practical difficulties in determining the degree of benefit to patients. To reduce controversies over whether a particular program benefits patients, two operational questions need to be asked about benefit: First, what standards should be used to determine benefit? Second, who decides whether a project is beneficial?

The standard for benefit should be evidence-based medicine and clinical epidemiology.<sup>60</sup> Criteria have been published in peer-reviewed journals for evaluating the strength of evidence in clinical trials. Studies should be given more weight if they have been designed to minimize bias and to enhance the generalizability of findings. Criteria have been established for specific issues in research design, such as selection of subjects, attention to potential confounding factors, specificity of the intervention, blinding, comparability of groups at

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58. See *id.* at 122.

59. See *As Drug Costs Rise, Health Plans Shift the Burden*, *supra* note 29, at 153; *Exploding Pharmacy Costs*, 3 ON MANAGED CARE 2 (1998). See generally Mark R. Chassin et al., *The Urgent Need to Improve Health Care Quality*, 280 JAMA 1000 (1998).

60. See generally Evidence-Based Medicine Working Group, *Evidence-Based Medicine: A New Approach to Teaching the Practice of Medicine*, 268 JAMA 2420 (1992).

baseline, selection of outcome measures, and adequacy of follow-up.<sup>61</sup> Furthermore, standards have been set for how to combine findings from disparate studies in a rigorous way.<sup>62</sup> These standards have been subjected to peer review and have been widely accepted.

When deciding whether to recommend that patients be changed from one drug to another, a pharmacy benefits management program should use these standards for evaluating clinical evidence when reviewing the pertinent published literature. The conclusions of a study should be given more weight if it has been conducted in accordance with these rigorous standards. Conversely, the conclusions should be given less weight if the study fails to meet these standards. Similarly, pharmacy benefits management programs that inform patients of new drugs are justified only if a critical review of the published evidence establishes that the drugs are superior to the alternatives or at least clinically equivalent. Again, standards have been established for specifying how to determine whether two drugs are clinically equivalent.

### *B. The Role of an Oversight Committee*

The second question in evaluating benefit to patients is who decides whether a project is beneficial. The decision-maker should be impartial and balanced. An interdisciplinary oversight committee is preferable to an individual decision-maker because different members can point out overlooked issues, unexamined assumptions, and hidden value judgments. In a committee, a range of perspectives can be articulated and considered. The committee should determine: whether the benefits of the program are sufficiently well established to justify the risk of breaches of confidentiality; whether adequate safeguards for confidentiality are in place; whether other ethical concerns about the program have been addressed; and whether a project should be characterized as advertising and therefore subject to heightened scrutiny.

To carry out these tasks the oversight committee should include patient advocates and experts in the confidentiality of computerized databases as well as clinical pharmacists, physicians, and experts in evidence-based medicine, who can help assess the strength of published evidence regarding a drug. This is a different membership from a pharmacy and therapeutics committee that determines what drugs a hospital will include in its formulary. Because of concerns about conflicts of interests, the majority of committee members should have no financial stake in the decisions, the organization holding the data, or a contracting organization and should not be employees of the organization or a

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61. See generally Guyatt et al., *User's Guide IIA*, *supra* note 35; Guyatt et al., *User's Guide IIB*, *supra* note 35.

62. See generally Antonia L. Dans et al., *User's Guide to the Medical Literature: XIV. How to Decide on the Applicability of Clinical Trial Results to Your Patients*, 279 JAMA 545 (1998); Guyatt et al., *User's Guide XVI*, *supra* note 35; Robert S. Hayward et al., *User's Guide to the Medical Literature: VIII. How to Use the Clinical Practice Guidelines: A. Are the Recommendations Valid?*, 274 JAMA 570 (1995).

contracting organization.

Independent review as a means to protect patients has a precedent in institutional review boards ("IRBs") for research on human subjects. IRBs are charged with protecting research subjects and assuring that the balance of benefits to risks in a research project is acceptable. Under federal regulations, IRBs are required to have members who are not associated with the institution, who are nonscientists, and who are primarily concerned with the welfare of subjects.<sup>63</sup> Furthermore, IRBs usually develop rules for recusing members who have ties to the investigator whose project is being reviewed in order to prevent conflicts of interest or the appearance of such conflicts. The inclusion of community members and persons with a range of disciplines is intended to enhance the committee's ability to carry out its functions.

Recently IRBs have been criticized for lacking expertise in ethical issues, paying too much attention to consent forms rather than study design, delaying important research because of bureaucratic requirements, and missing serious ethical lapses.<sup>64</sup> Many believe that IRBs are overworked and lack the resources to carry out their job adequately. These criticisms of IRBs can be useful in designing oversight committees for using patient databases for pharmacy benefits management. First, these oversight committees need to consider both the benefit of the pharmacy benefits management and the risk of violating confidentiality. IRBs have been criticized for examining only the risks to subjects, not the benefits of the research. Critics assert that the balance of benefits to risks that is crucial. In a similar way, database oversight committees need to consider the clinical benefits of using personal health information in pharmacy benefits management, the risks of breaching confidentiality, and adequacy of steps taken to minimize breaches of confidentiality. Second, database oversight committees must have sufficient resources to carry out their task. Third, these committees need to operate in a timely manner. Procedures need to be devised to assure prompt but thorough review of proposed pharmacy benefits management programs.

### *C. Patient Authorization*

The Department of Health and Human Services proposed regulations allow electronic personal health information to be used without patient authorization for treatment, payment, and core business operations.<sup>65</sup> The Department argues that signing an authorization form does little to promote confidentiality.<sup>66</sup>

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63. See Protection of Human Subjects, 45 C.F.R. § 46.107 (1998).

64. See OFFICE OF EXTRAMURAL RESEARCH, NAT'L INT. OF HEALTH, EVALUATION OF NIH IMPLEMENTATION OF SECTION 491 OF THE PUBLIC HEALTH SERVICE ACT, MANDATING A PROGRAM OF PROTECTION FOR RESEARCH SUBJECTS (1998); GAO, CONTINUED VIGILANCE CRITICAL TO PROTECTING HUMAN SUBJECTS 17-23 (1998).

65. See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264(c)(2), 110 Stat. 1936, 2033 (1996).

66. See *id.*



However, notification and authorization show respect for patients as persons, even if their practical choices are constrained. For those patients who are deeply concerned about breaches of confidentiality, a requirement of authorization gives them greater control over their personal health information. Even if few patients can afford to limit access to their personal health information, it is important to make it simple for them to do so.

Authorization is particularly important for pharmacy benefits management because of concerns about the degree of patient benefit and about conflicts of interests. Because of such issues, some patients may not want their personal health information to be used by certain pharmacy benefits management programs. Requiring affirmative authorization gives patients more control over the use of personal health information than placing the burden on patients to object. The legal formality of signing a document calls attention to the possibility of choice and objection.<sup>67</sup> An authorization requirement increases the likelihood that patients will act on serious concerns.<sup>68</sup> As in research studies, participation rates are likely to be lower if affirmative consent is required than if patients are entered into the program unless they object.<sup>69</sup>

1. *Authorization as a Condition of Care.*—Patient choice is constrained by the economic reality that drug costs and overall health costs need to be restrained. Health care organizations and plans should be allowed to make the use of personal health information for pharmacy benefits management a condition of care. The burdens of keeping records of individual authorization or allowing individuals to opt-out of certain uses of their personal health information will reduce the cost-effectiveness of pharmacy benefits management. Administrative burdens will be particularly heavy if patients want their personal health information to be used for certain pharmacy benefits management programs but not others. Furthermore, there are important considerations of justice at stake. A patient who does not participate in pharmacy benefits management is a “free rider,” obtaining the benefits of cost-effective care without sharing the risks to confidentiality. When physicians make a drug switch, they tend to make the switch for other patients as well.<sup>70</sup> Thus, other patients benefit if a pharmacy benefits management program points out that an effective drug is underutilized or suggests that the patient be switched to an equivalent but more cost-effective drug.

2. *Authorization Need Not Be Burdensome.*—On annual enrollment or first clinical contact health care providers now commonly obtain authorization to release information to third party payers. Even where such release is authorized by statute, health care providers commonly ask patients to sign an authorization. At those times, patients could also be asked to authorize the use of their health information for pharmacy benefits management. Thus, requiring authorization

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67. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

68. See Health Privacy Working Group, *supra* note 23.

69. See NATIONAL BIOTHICS ADVISORY COMM’N, RESEARCH ON HUMAN STORED BIOLOGIC MATERIALS 69-70 (1999).

70. See Rosoff, *supra* note 14, at 12.



would not necessarily entail additional costs to health care organizations because many are already obtaining such authorization. Note that authorization may need to be obtained at the point of service because patients may seek care without previous contact with the provider. Separate authorization for each use of information, as advocated by some health privacy advocates, would be prohibitively burdensome. A policy of one-time authorization that allows authorization to be a condition of care is a feasible middle ground between statutory authorization and authorization for each specific use.<sup>71</sup>

3. *Disclosure or Prohibition of Financial Conflicts of Interest.*—Disclosure of financial arrangements is a widely accepted response to conflicts of interests and may be useful in several ways.<sup>72</sup> Public scrutiny may deter projects that are ethically problematic, as ultimately occurred in the Elensys case.<sup>73</sup> Disclosure of financial arrangements in pharmacy benefits management also may help patients make several important decisions, including whether to choose a particular benefits plan, whether to appeal a formulary restriction, or whether to pay more out of pocket for a drug not on the plan's list of preferred drugs.

Some conflicts of interests are so severe that they should be prohibited, rather than merely disclosed.<sup>74</sup> The likelihood and magnitude of biased decisions is too great, or the perception that decisions will be unfair is unacceptable. Pharmacy benefits management programs should not pay pharmacists for switching patients to specific drugs.<sup>75</sup> If reimbursement to pharmacists in drug switching programs truly is for record review, patient education, and discussion with the physician, the pharmacist should be paid for these activities even if no subsequent switch is made.

#### D. Sensitive Medical Conditions

Some conditions, such as HIV infection, mental illness, and substance abuse, carry greater risks of discrimination and stigma. Many states have enacted stricter confidentiality protections for such conditions. For example, specific written consent may be required to disclose HIV test results or mental health records.<sup>76</sup> However, effective therapies are underused in these conditions, and primary care physicians underdiagnose and undertreat major depression.<sup>77</sup>

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71. See Health Privacy Working Group, *supra* note 23.

72. See LO, *supra* note 19, at 267-72; Dennis F. Thompson, *Understanding Financial Conflicts of Interest*, 329 NEW ENG. J. MED. 573, 575 (1993).

73. See O'Harrow, *Giant Food*, *supra* note 3, at A1.

74. See LO, *supra* note 19, at 267-72.

75. See Baker, *supra* note 43, at C1.

76. See CAL. CIV. CODE §§ 56-56.37 (Deering 1997); Ronald Byer, *Public Health Policy and the AIDS Epidemic: An End to HIV Exceptionalism?*, 324 NEW ENG. J. MED. 1500, 1501-02 (1991); Gostin, *supra* note 20, at 508.

77. See generally Robert M.A. Hirschfeld et al., *The National Depressive and Manic-Depressive Association Consensus Statement on the Undertreatment of Depression*, 277 JAMA 333, 333-40 (1997).

Physicians commonly use suboptimal doses of antidepressants, stop the drug too soon, or fail to consider other therapeutic approaches if an antidepressant is ineffective. Therefore, patients with sensitive conditions could benefit from pharmacy benefits management that monitors underutilization of beneficial drugs and failure to obtain refills.

Pharmacy benefits management should be permitted for these sensitive conditions that are accorded greater protection by state law, but it should be subject to several additional safeguards. First, exclusive authorization to access personal health information regarding sensitive conditions for this purpose should be separate from authorization to access other personal health information. Second, there should be earlier and more significant physician involvement in pharmacy benefits management for these sensitive conditions. Physicians should be involved both in planning projects and notifying patients when changes in therapy are recommended. Such physician involvement helps ensure that programs are based on sound clinical judgment and truly benefit the patient. And lastly, organizations carrying out such programs should consult with advocacy groups for persons with the condition. Such consultation will help health care organizations to address patient concerns about confidentiality and may suggest changes that would increase acceptance of the program. For example, a pharmacy benefits management program on mental illness is likely to be more widely accepted by patients if it cannot access detailed psychotherapy notes that contain the patient's innermost feelings, fantasies, and fears. A 1995 incident in which psychotherapy notes were readily accessible on the computer network of a health maintenance organization illustrated that patients regard inappropriate access to psychotherapy notes as a serious breach of confidentiality.<sup>78</sup> Such access to intimate information is not needed to achieve the goals of pharmacy benefits management. Finally, comprehensive safeguards are particularly important for sensitive conditions, as we next discuss.

With such safeguards in place and with assurance that therapy notes will not be disclosed, patients are more likely to be willing to disclose such information as their diagnosis, medications, scores on functional status scales, and number and duration of office visits. This information, frequently withheld, is precisely what pharmacy benefits management programs need in order to determine whether the patient is receiving appropriate drugs, dosage, and duration of treatment.

#### *E. Safeguards for Confidentiality*

Policies regarding pharmacy benefits management make sense only within the context of comprehensive protections for personal health information. Organizational, technical, and physical safeguards for confidentiality have been extensively discussed.<sup>79</sup> The Department of Health and Human Services has

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78. See Alison Bass, *HMO Puts Confidential Records On-Line: Critics Say Computer File-Keeping Breaches Privacy of Mental Health Patients*, BOSTON GLOBE, March 7, 1995, at A1.

79. See generally FOR THE RECORD, *supra* note 11; NATIONAL COMM. FOR QUALITY

issued proposed regulations for the security of individual health information by health care providers, plans, and clearinghouses.<sup>80</sup> These proposed regulations include:

1. Limitations on access. Ethically, use of patient-identifiable information should be restricted to what is needed for a specific project. The proposed regulations require that employees of health care organizations should have access only to information they need to perform their roles. For example, unlike nurses and physicians, billing clerks do not need access to detailed clinical information such as test results. Access may be restricted according to the person's role in the organization or place of work.<sup>81</sup>
2. Organizational policies and procedures regarding confidentiality, implemented through employee training and disciplinary actions for violations.<sup>82</sup>
3. Technical security to control and monitor access to information and to prevent unauthorized access. The identity of the person seeking access should be verified through unique user identification and verification through a token, personal identification number, password, or a biometric identification system. There should be audits of access to the system, in order to identify problems. In particular, an audit trail of all persons who have accessed a person's records allows unauthorized access to be detected.<sup>83</sup>

In addition to these safeguards, the Elensys incident illustrates the need for restrictions on service organizations that contract with health care providers to analyze electronic personal health information. Personal health information should have the same protection, whether it is used internally within a health care organization that collected the information or by an external service organization. In other words, patients should have the same protections for identifiable health information, no matter who is using the data. The information should always be protected, no matter where the information is within the health care delivery system. Furthermore, service organizations should not use personal health information for purposes other than the original disclosure, and they should not disclose the data to third parties, without additional authorization from the patient.

Information about safeguards should be made available to patients. Patients who are informed about the measures taken to maintain confidentiality may conclude that their concerns have been adequately addressed. In turn, such

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ASSURANCE, ACCREDITATION 2000, DRAFT STANDARDS FOR MANAGED CARE ORGS. & MANAGED BEHAVIORAL HEALTH CARE ORGS. (1999).

80. See Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160-164 (1999).

81. *Id.* § 164.506(a).

82. *Id.* § 164.518.

83. *Id.* § 164.518(c).

patients may then be willing to have their personal health information used in pharmacy benefits management programs.

#### *F. Additional Restrictions for Advertising*

Some programs calling themselves "pharmacy benefits management" are more accurately characterized as advertisements. The organization's oversight committee should have the authority to decide whether this is the case.<sup>84</sup> In light of the concerns about advertising discussed earlier in the paper, additional protections are needed when personal health information is used for this purpose. Patient authorization to use personal health information for advertising should be separate from authorization for pharmacy benefits management.<sup>85</sup> A separate authorization highlights differences between advertising and other uses of personal health information. Furthermore, authorization for advertising should never be used as a condition of care. Patients should be told that they may refuse authorization for advertising without compromising the care that they receive from the provider or health care plan. Patients also should be able to withdraw authorization for advertising at a later time.

#### CONCLUSION

Federal debates on health privacy offer the opportunity to develop coherent confidentiality policies. Comprehensive policies can both relieve patient concerns about confidentiality and also allow appropriate use of personal health information in pharmacy benefits management. Sound policies for using personal health information in pharmacy benefits management should require clear evidence of benefit to patients, an oversight committee, patient authorization, disclosure or prohibition of conflicts of interest, additional safeguards for sensitive medical conditions, adequate confidentiality safeguards, and additional restrictions on advertising.

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84. See discussion *supra* Part IV.B.

85. See *Health Privacy Working Group*, *supra* note 23, at 5.



## NOTES

### LENIENCY IN EXCHANGE FOR TESTIMONY: BRIBERY OR EFFECTIVE PROSECUTION?

A. JACK FINKLEA\*

#### INTRODUCTION

"If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."<sup>1</sup> With those words, a panel of the Tenth Circuit Court of Appeals struck down the prosecutorial practice of offering leniency to witness-accomplices in exchange for testimony against other crime participants by labeling it bribery. The decision set off a panic through the Department of Justice, and federal prosecutors throughout the country feared the consequences that might follow the abrogation of this age-old form of plea bargaining.<sup>2</sup> The Tenth Circuit panel's decision brought to the forefront intense issues in need of examination. The full circuit reheard the case on its own motion, and, on January 8, 1999, the court reinstated the trial court ruling, thereby upholding Singleton's conviction.<sup>3</sup> Courts across the country have followed the rationale of the full circuit's rehearing, thus foreclosing this challenge to the bribery statute.<sup>4</sup> However, defense lawyers have now filed similar challenges in state courts where the state bribery laws are similar to the federal statute.<sup>5</sup> Because the United States

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\* J.D., 2000, Indiana University School of Law—Indianapolis; B.A., 1996, Indiana University Purdue University, Indianapolis.

1. *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

2. *See generally* William Glaberson, *Leniency Ruling Jolts U.S. Legal Procedures*, JOURNAL RECORD (Okla. City), Nov. 4, 1998 (stating that the original panel's ruling "caused chaos in the district courts and U.S. attorney's offices in [the 10th] circuit and significant disruption throughout the rest of the country"); Warren Richey, *Rethinking Testimony for Sale—Federal Court Ruling Could Undermine the Longstanding U.S. Practice of Plea-bargaining*, CHRISTIAN SCI. MONITOR, July 22, 1998, at 1 (stating that cooperating witnesses have played indispensable roles "in virtually every major federal case prosecuted in recent history, including the convictions of Manuel Antonio Noriega and John Gotti").

3. *See Singleton*, 165 F.3d at 1302.

4. *See, e.g., United States v. Bidloff*, 82 F. Supp.2d 86, 93 (W.D.N.Y. 2000).

5. *See generally* Glaberson, *supra* note 2.



Supreme Court denied Singleton's petition for certiorari,<sup>6</sup> the Court has yet to decide whether government prosecutors must conduct themselves procedurally in the same manner as defendants or whether other statutes imply an acceptance of exchanging leniency for testimony.

This Note examines the federal bribery statute and how it affects federal prosecutors who make plea deals with co-defendants in exchange for their testimony. Part I offers background and history on the exchange of leniency for testimony. Part II analyzes the bribery statute through the lens of the plain meaning doctrine of statutory interpretation, focusing upon the question whether federal prosecutors should be subject to the statute. Part III examines whether the exclusion of purchased testimony is the proper remedy for violations of the bribery statute. Finally, Part IV asks whether the exclusion of purchased testimony comports with notions of justice.

### I. BACKGROUND OF PLEA AGREEMENTS IN EXCHANGE FOR TESTIMONY

On July 1, 1998, the United States Court of Appeals for the Tenth Circuit stunned federal prosecutors by excluding testimony of a co-conspirator given in exchange for a plea bargain.<sup>7</sup> The full Circuit vacated the judgment on the Court's own motion,<sup>8</sup> and on rehearing, the full Circuit affirmed the district court, thereby upholding Singleton's conviction.<sup>9</sup> Nevertheless, the decision sent federal prosecutors and defense attorneys scrambling.<sup>10</sup>

In the panel decision, Sonya Singleton was convicted in a drug conspiracy case in Wichita, Kansas. The conviction was based largely on testimony given by a co-defendant who testified against Singleton in exchange for a lighter sentence.<sup>11</sup> Singleton's lawyer, John V. Wachtel, argued before the Tenth Circuit Court of Appeals that the exchange of testimony for a lighter sentence was bribery under 18 U.S.C. § 201(c)(2), and the court unanimously agreed.<sup>12</sup> Judge Kelly, writing for the court, said that "if justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so."<sup>13</sup> Based on this perversion of justice, the court excluded

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6. See *Singleton v. United States*, 524 U.S. 1024 (1999).

7. See *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); *see also supra* note 2.

8. See 144 F.3d at 1343.

9. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (*en banc*), *cert. denied*, 527 U.S. 1024 (1999).

10. See Warren Richey of the *Christian Science Monitor* wrote that "the Department of Justice is asking lawyers across the U.S. to keep track of every related motion filed by defense lawyers adopting the 10th Circuit reasoning." Richey, *supra* note 2, at 10. Furthermore, if the ruling is reinstated, "it could free 90 percent of the convicted felons in jail." *Id.*

11. See Tom Jackman, *Ruling Threatens Federal Plea Deals: Bargains Are Bribery, Appeals Court Decides in Case That Began in Wichita*, KANSAS CITY STAR, July 9, 1998, at A1.

12. See *id.*

13. *Singleton*, 144 F.3d at 1346.

the testimony and ordered a new trial.<sup>14</sup> On rehearing (*Singleton II*), the full Circuit reinstated the district court's admission of the testimony, holding that the federal government was not intended to fall within the meaning of the word "whoever" in the bribery statute.<sup>15</sup>

The statutory challenge follows previous unsuccessful arguments to exclude testimony given in exchange for a plea deal based on the Constitution's due process clauses.<sup>16</sup> Courts have allayed the due process concerns in plea bargains by requiring (1) defense notice of the deal, (2) adequate opportunity for cross-examination, and (3) proper instructions to the jury.<sup>17</sup> While some commentators understand the refusal of the courts to exclude purchased testimony as a sign that the same result will occur in the statutory challenge,<sup>18</sup> an argument can be made that minimum due process requirements have little to do with the need to control the integrity of the judicial process. This is done by changing the court's focus from the rights of the defendant to the duties of the judge and prosecutor. It would be more difficult for courts to acquiesce in the wrongdoing of the prosecutor if they were to recognize that testimony given in exchange for leniency is actually purchased testimony, and the risk of perjury is great enough to warrant the exclusion of the testimony.

#### *A. History of Plea Agreements in Exchange for Testimony*

The English common law allowed accomplice testimony, but it had varying consequences.<sup>19</sup> Accomplices in felony trials were deemed competent to testify and were pardoned if a conviction was obtained against the defendant.<sup>20</sup> However, if the defendant was acquitted, the witness was usually executed.<sup>21</sup> This practice, known as approvement, was discontinued in the 1500s because a majority of the bench came to believe that the testimony of an accomplice under such circumstances was so conducive to perjury as to outweigh its value.<sup>22</sup>

The approvement doctrine evolved into the practice of "turning king's evidence," which allowed an accomplice to be pardoned in exchange for truthful

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14. See *id.* at 1361.

15. *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), and cert. denied, 527 U.S. 1024 (1999). Section 201(c)(2) of Title 18 provides that "whoever . . . (2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath . . . shall be fined under this title or imprisoned." 18 U.S.C. § 201(c)(2) (1994).

16. See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

17. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Dailey*, 759 F.2d 192 (1st Cir. 1985).

18. See *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

19. See Neil B. Eisenstadt, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. REV. 749, 761 (1987).

20. See *id.*

21. See *id.*

22. See *id.* (citation omitted).

testimony, regardless of the outcome of the trial.<sup>23</sup> Eliminating the execution of a witness upon acquittal of the defendant lessened the motivation to commit perjury. Turning king's evidence withstood scrutiny in the treason trials of the Seventeenth Century, with courts holding that the accomplice was a competent witness with diminished credibility.<sup>24</sup> American decisions have followed the rule of these treason trials with little examination of the cases, adapting the doctrine to cover pardons, leniency, and immunity.<sup>25</sup>

Modern law has seen the incorporation of the king's evidence doctrine into the major treatises on criminal law and evidence.<sup>26</sup> Furthermore, the doctrine has been significantly furthered by the codification of the Organized Crime Control Act of 1970.<sup>27</sup> Better known as the Witness Protection Program, the Act grants the accomplice-witness liberty, money, and property for his "truthful" testimony. This program has grown from the legislature's intended expectations of relocating thirty to fifty witnesses a year to actually relocating 240 to 300 each year with an annual budget of at least \$61.8 million.<sup>28</sup> One of the most notable participants in the program is Salvatore "Sammy the Bull" Gravano, who may have been given liberty, money, and even plastic surgery for his testimony against John Gotti.<sup>29</sup> The ironic twist lies in the fact that Gravano actually committed at least nineteen acts of murder on Gotti's order.<sup>30</sup> Nevertheless, Gotti is behind bars and Gravano purportedly has a new name and face.<sup>31</sup> Pushing the king's evidence doctrine to this extreme has led to challenges on several fronts, including due process claims.

### B. Due Process Challenges

Although the Supreme Court has never explicitly ruled on whether accomplice testimony received in exchange for leniency violates the due process clause, constitutional challenges are now undertaken less frequently.<sup>32</sup> *United*

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23. *Id.*; see also *Rudd's Case*, 1 Leach 115, 168 Eng. Rep. 160 (K.B. 1775) (holding that an accomplice can be pardoned for truthful testimony).

24. See *Eisenstadt*, *supra* note 19.

25. See *id.* at 762.

26. See *id.*

27. Pub. L. 91-452, §§ 501-04, 84 Stat. 922, 933-34 (1970).

28. See Risdon N. Slate, *The Federal Witness Protection Program: Its Evolution and Continuing Growing Pains*, 16 CRIM. JUST. ETHICS 20 (1997).

29. The United States Marshals Service would neither confirm nor deny that Gravano was a participant, but in television interviews on ABC's "Prime Time Live" and "Turning Point," Gravano, himself, has admitted he was in the program for a time. See *id.* at 20 n.11.

30. See Slate, *supra* note 28.

31. Although Gravano did receive a sentence for his crimes, it was "remarkably light" and the use of Gravano's testimony at all "placed a premium on fabrication and criminality." Harvey A. Silverplate, *Use of Informers Hurts Accuseds' Rights*, NAT'L L.J., Jan. 30, 1995, at A21.

32. See *id.*

*States v. Waterman*,<sup>33</sup> illustrates the controversy that existed before due process challenges to leniency deals were abandoned. Indeed, *Waterman* played a major role in causing the death of due process challenges.

*Waterman* involved a contingency agreement whereby the witness was to be granted a two-year reduction in his sentence if his testimony led to further indictments.<sup>34</sup> The Eighth Circuit panel found that "placing 'a premium on testimony adverse to a defendant' created 'a risk of perjury so great that even the jury's full knowledge of the agreement is insufficient to protect the fundamental fairness inherent in the due process clause.'"<sup>35</sup> On rehearing, however, the full Circuit was evenly divided; therefore, the District Court's rejection of the Fifth Amendment challenge was reinstated.<sup>36</sup> Interestingly, the half of the court that voted to reinstate the district court's ruling gave no explanation, leaving one to suspect whether they were confident in their own ruling.<sup>37</sup>

The First Circuit came to the same conclusion one year later in *United States v. Dailey*.<sup>38</sup> Similarly, the Supreme Court in *Hoffa v. United States*,<sup>39</sup> ruled that the government's use of paid informants did not violate the due process clause of the Fifth Amendment.<sup>40</sup> Although the Court recognized that a motive to lie existed, it placed great confidence in cross-examination and a properly instructed jury to weigh the witness's credibility.<sup>41</sup>

A due process violation is exemplified in the Supreme Court's ruling in *Giglio v. United States*.<sup>42</sup> The Court ordered a new trial because the chief witness for the prosecution had entered into a plea agreement for his testimony against the defendant but the defendant was not notified of the agreement.<sup>43</sup> The Court again stressed the importance of aggressive cross-examination and proper jury instruction to weigh the credibility of a witness.<sup>44</sup>

The legacy of due process cases shows a tremendous faith in the powers of cross-examination and proper jury instruction. As long as the defendant is given notice of the plea agreement, due process will not be offended. Thus, the routine use of paid informants and accomplice-witnesses by federal prosecutors seems

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33. 732 F.2d 1527 (8th Cir. 1984).

34. See Silverglate, *supra* note 31, at A21.

35. *Id.* (quoting *Waterman*, 732 F.2d at 1530).

36. See *id.*

37. See *id.*

38. 759 F.2d 192, 197 (1st Cir. 1985) (holding that the risk of perjury, while substantial, was not so great as to offend due process).

39. 385 U.S. 293 (1966).

40. See *id.* at 310-11.

41. See *id.* at 311; see also *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (holding that an informant who was promised a contingency fee by the government is not *per se* disqualified from testifying).

42. 405 U.S. 150 (1972).

43. See *id.*

44. See *id.* at 154-55.

to indicate that due process challenges have been abandoned.<sup>45</sup>

*C. Statutory Challenge—United States v. Singleton*<sup>46</sup>

When due process challenges met their demise, defense attorneys sought an alternative avenue of attack. John V. Wachtel, a Wichita defense attorney, chose the bribery statute<sup>47</sup> as a possible way of excluding purchased testimony in the case of his client, Sonya Singleton.<sup>48</sup> In 1992, Singleton was indicted on multiple counts of money laundering and conspiracy to distribute cocaine.<sup>49</sup> Investigators viewed her repeated use of Western Union to wire money between California and Wichita, and subsequent deliveries of drugs, as an exchange for cocaine.<sup>50</sup> Before trial, Singleton moved to suppress the testimony of a co-conspirator, Napoleon Douglas, because Douglas had entered into a plea agreement in exchange for his testimony.<sup>51</sup> The basis of Singleton's motion was that the government impermissibly gave a "thing of value" to a witness for his testimony, thus violating 18 U.S.C. § 201(c)(2), the bribery statute.<sup>52</sup> Section 201(c)(2) states that "whoever, directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony . . . to be given . . . shall be fined . . . or imprisoned."<sup>53</sup> The district court denied the motion and allowed Douglas to testify.<sup>54</sup> Singleton was subsequently convicted.<sup>55</sup>

The Tenth Circuit panel reversed the district court's opinion, holding that federal prosecutors who offer leniency in exchange for testimony violate the bribery statute and that testimony received via plea agreements should be excluded.<sup>56</sup> In so holding, the court broadly construed the bribery statute to further the legislative purpose of deterring corruption and used the plain meaning of the statute to hold the government accountable for purchasing testimony.<sup>57</sup> Specifically, the court ruled that the word "whoever" included the government,<sup>58</sup> and that the phrase "anything of value" included promises of leniency.<sup>59</sup>

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45. See Silvergate, *supra* note 31, at A21.

46. 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), and *cert. denied*, 527 U.S. 1024 (1999).

47. 18 U.S.C. 201(c)(2) (1994).

48. See generally Glaberson, *supra* note 2.

49. See *Singleton*, 144 F.3d at 1344.

50. See *id.*

51. See *id.*

52. *Id.*

53. 18 U.S.C. § 201(c)(2) (1994). This is also known as the gratuity provision of the bribery statute, which means that no intent to influence the testimony is necessary for a violation to occur.

54. See *Singleton*, 144 F.3d at 1344.

55. See *id.*

56. See *id.* at 1361.

57. See *id.* at 1345.

58. *Id.* (quoting 18 U.S.C. § 201(c)(2)).

59. *Id.* at 1349-51 (quoting § 201(c)(2)).

Additionally, the court noted that provisions of the code that allow for leniency in the sentencing of accomplice-witnesses who have substantially assisted the prosecutor can coexist with the holding that leniency in exchange for testimony is bribery.<sup>60</sup> Finally, the court ruled that exclusion was the proper remedy because it preserved judicial integrity.<sup>61</sup> The court noted that "the anti-gratuity provision of § 201(c)(2) indicates Congress's belief that justice is undermined by giving, offering, or promising anything of value for testimony."<sup>62</sup>

Ten days after the Tenth Circuit panel decision, the entire circuit, on its own motion, granted rehearing en banc.<sup>63</sup> On rehearing, the full circuit held that "whoever" does not include the government, and offers of leniency for testimony, a common practice long before the bribery statute was codified, have become an established prosecutorial tool, prohibited only by clear and unmistakable language.<sup>64</sup>

The *Singleton I* decision was a bold move, going against years of routine practice by federal and state prosecutors. The first court to criticize the *Singleton I* panel's decision did so just three weeks after the *Singleton I* decision. The Eastern District of Michigan in the Sixth Circuit decided the same issue differently in *United States v. Arana*.<sup>65</sup> The district court ruled that purchased testimony is not bribery because (1) the term "whoever" in the bribery statute should not be construed to include federal prosecutors,<sup>66</sup> and (2) the phrase "anything of value" should not include promises of leniency because the prosecutor merely has the power to recommend leniency rather than ensure it.<sup>67</sup>

Initially, after the *Singleton I* panel decision and *Arana* rulings, courts came down on both sides of the debate, but the majority of cases have since fallen in line with the full circuit's ruling in *Singleton II*, refusing to exclude testimony received through witness cooperation.<sup>68</sup> There is a disparity, however, among the rationales behind the court rulings which prompts a critical review of the bribery statute as it pertains to testimony received in exchange for promises of leniency.

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60. See *id.* at 1354-56.

61. See *id.* at 1359-61.

62. *Id.* at 1346.

63. See *United States v. Singleton*, 165 F.3d 1297, 1298 (10th Cir.) (en banc), *cert. denied*, 527 U.S. 1024 (1999).

64. *Id.* at 1298-1301.

65. 18 F. Supp.2d 715 (E.D. Mich. 1998).

66. *Id.* at 717-18.

67. *Id.* at 719-21.

68. See *United States v. Crumpton*, 23 F. Supp.2d 1218 (D. Colo. 1998) (holding that Congress has implicitly authorized plea agreements); *United States v. Revis*, 22 F. Supp.2d 1242 (N.D. Okla. 1998) (holding that although prosecutor's conduct met the bribery statute, it is a general statute and is subordinate to specific sentencing guidelines which allow plea bargaining); *United States v. Reid*, 19 F. Supp.2d 534 (E.D. Va. 1998) (holding that plea agreements do not violate the bribery statute).



## II. IS THE GOVERNMENT BRIBING WITNESSES BY OFFERING LENIENCY?

### A. Legislative History

Whenever a court interprets a statute, it seeks to apply the intent of the legislature. Courts differ, though, in their definition of legislative intent. Generally, however, there are two means for finding intent: (1) examining the legislative history, and (2) examining the plain language of the statute. First, it must be noted that a court should not examine the legislative history of a law when the language is clear and unambiguous.<sup>69</sup> Of course, differing interpretations of what is clear and unambiguous are always possible, so the legislative history is frequently examined regardless. Ultimately, a court tries to rule *ex post* in a manner consistent with the way the legislature would have ruled *ex ante*, with the understanding that the judicial branch is separate from the legislative branch of government.

The legislative history in this case lends little to the resolution of the conflict. The bribery statute was first codified in 1909, when both offering and receiving bribes with the intent to influence testimony was prohibited.<sup>70</sup> The statute was amended in 1948, with 18 U.S.C. § 209 prohibiting the giving or offering any money or thing of value to influence testimony.<sup>71</sup> The 1948 code also had a gratuity provision that prohibited giving any money or thing of value to a revenue officer.<sup>72</sup> However, the gratuity provision did not prohibit giving a gratuity to a witness.<sup>73</sup>

The bribery statute is presently codified under Chapter 11 of Title 18 which is entitled "Bribery, Graft, and Conflicts of Interest." Specifically, the current statute is the result of four bills converging in 1961 to strengthen conflicts of interest legislation and consolidate the bribery laws.<sup>74</sup> The Senate Report on the bill which became the present law states that "[t]he necessity for maintaining high ethical standards of behavior in the Government becomes greater as it[s] activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy."<sup>75</sup> Moreover, the Senate report, speaking on conflicts of interest, specifically recognizes the dangers of abuse of Government not only in accepting money, but also in awarding a valuable license

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69. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 873 (1991).

70. See *United States v. Kennings*, 861 F.2d 381, 387 (3d Cir. 1988); *United States v. Revis*, 22 F. Supp.2d 1242, 1249 (N.D. Okla. 1998) (citing Pub. L. No. 350, §§ 134, 35 Stat. 1088, 1113 (1909)).

71. See *Revis*, 22 F. Supp.2d at 1249 (citing Pub. L. No. 772, §209, 62 Stat. 683, 693 (1948)).

72. See *id.*

73. See *id.*

74. See S. REP. NO. 87-2213, reprinted in 1962 U.S.C.C.A.N. 3852.

75. *Id.* Arguably, Congress was speaking more to the conflicts of interest portion of the bill in its statement. Nevertheless, the joining of conflicts of interest and bribery in the same bill seems to show a common purpose, that ethical standards of behavior are of primary concern.

or other privilege.<sup>76</sup>

The 1962 amendment marked the point at which gratuities to witnesses were first prohibited by statute, meaning that no intent to influence testimony was necessary for a violation to occur. Whether speaking in terms of conflict of interest or bribery, the dangers of abuse exist in payments of money and also in less tangible considerations, and should be swept from the halls of government. That said, the history of the bribery statute does not suggest specifically whether federal prosecutors were contemplated under the statute; nor does the history suggest whether offers of leniency are of any value.<sup>77</sup> However, Senators Kohl and Leahy, in separate bills, sought during the 1998 term to establish the proposition that the traditional practice of offering leniency in exchange for testimony should be upheld.<sup>78</sup> Both Senators proposed amendments to 18 U.S.C. § 201, but both bills stalled and died in the judiciary committee; thus, leaving open the question of whether the legislature intended to subject prosecutors to the bribery statute.

### *B. Plain Meaning Doctrine*

In construing statutes, courts must look to the plain language of the statute.<sup>79</sup> The text of the statute itself is the best evidence of congressional intent.<sup>80</sup> Courts have repeatedly stated that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."<sup>81</sup> Moreover, the Supreme Court has ruled that a statute can be unambiguous without addressing every interpretive theory.<sup>82</sup> "[T]he fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"<sup>83</sup> In exceptional circumstances, a court will stray from the plain language of the statute. These circumstances have been generally limited to two situations: (1) when a contrary legislative intent is

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76. *See id.*

77. The 1962 Senate report referred to the bribery provision at issue as § 201(h). It later became § 201(c)(2) without any substantive changes.

78. S. 2484, 105th Cong. (1998); S. 2311, 105th Cong. (1998).

79. *See* 2A NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.01 (5th ed. 1992).

80. *See* Guidry v. Sheet Metal Workers Int'l Assoc., 10 F.3d 700, 708 (10th Cir. 1993).

81. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (holding that the Court's inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (holding that if the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive).

82. *See* *Salinas v. United States*, 522 U.S. 52, 60 (1997).

83. *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

clearly expressed,<sup>84</sup> and (2) where the plain language interpretation would lead to an absurd result.<sup>85</sup> The bribery statute fits neither of these exceptions.

While courts have limited their examination of statutes to the plain language, they have not limited it to the expressed intent of the legislature.<sup>86</sup> *Brogan v. United States*,<sup>87</sup> dealing with the "exculpatory no doctrine,"<sup>88</sup> said that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . ."<sup>89</sup> Moreover, that Court said that it "cannot be [the Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than text of the statute itself."<sup>90</sup> Because the bribery statute is aimed at deterring corruption, the statute should be construed broadly enough to further the legislative purpose of deterring corruption.<sup>91</sup>

Other courts, however, have found this broad construction to be at odds with the general rule that criminal statutes are to be narrowly construed.<sup>92</sup> The district court for the Northern District of Oklahoma ruled that the legislature's approval of the court's broad construction of the bribery statute only pertained to acts by public officers while in their "official capacity."<sup>93</sup> This distinction, however, fails to exclude prosecutors from the bribery statute. Indeed, the main controversy concerns the conduct of prosecutors while performing their professional duties. Furthermore, *Brogan* stands for the proposition that it is impossible to try and narrowly construe statutes in a case by case manner because there is no way of knowing when or how the rule is to be invoked.<sup>94</sup>

Even if the prosecutor could argue that he was not performing his official duty, it may not be necessary. Section § 201(c)(2) does not require the prosecutor to be performing his official duty whereas § 201(c)(1) does express

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84. See *Ardestani v. INS*, 502 U.S. 129, 135-36 (1991).

85. See *SINGER*, *supra* note 79, at § 46.07. See generally *Nardone v. United States*, 302 U.S. 379 (1937).

86. Furthermore, courts have refused to limit a statute to the words in the title. See *Yeskey*, 524 U.S. at 212 ("[T]he title of a statute . . . cannot limit the plain meaning of the text." (quoting *Trainmen v. Baltimore & Oh. R.R. Co.*, 331 U.S. 519, 528-29 (1947))).

87. 522 U.S. 358 (1998).

88. The "exculpatory no" doctrine previously provided that defendants could not be prosecuted for making false statements to federal investigators when the statements consisted of merely denying any wrongdoing. The Supreme Court in *Brogan v. United States* abrogated the "exculpatory no" doctrine. *Id.* at 812.

89. *Id.* at 811-12.

90. *Id.* at 809.

91. See *United States v. Singleton*, 144 F.3d 1343, 1345 (10th Cir. 1998), *rev'd en banc*, 165 F.3d, 297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

92. See *United States v. Revis*, 22 F. Supp.2d 1242, 1251 (N.D. Okla. 1998). See generally *United States v. Fruit Growers' Express Co.*, 279 U.S. 363, 369 (1929).

93. *Revis*, 22 F. Supp.2d at 1252.

94. See *Brogan v. United States*, 522 U.S. 358 (1998).

that requirement.<sup>95</sup> Because courts find it significant when a statute contains a provision in one section of the statute and omits it in another, they may find that the failure to include this requirement indicates Congress' intent that the requirement not pertain to this provision.<sup>96</sup>

While courts seek refuge in the plain language of statutes, they refuse to look merely to a particular phrase. Instead, courts will examine the whole statute so as to give effect to the will of Congress.<sup>97</sup> Specifically, the Supreme Court has ruled that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>98</sup> Clearly, most phrases in a complex statute are not amenable to parsing, lest the remainder of the statute be labeled superfluous, and there is "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."<sup>99</sup> The bottom line is that the courts are charged with giving effect to the plain language of statutes in order to further the legislative intent behind the statutes. In so doing, the courts will examine the entire statute.

One final canon of statutory interpretation involves the relationship between statutes of general application and those of specific application. Courts generally hold that "if a specific statutory provision conflicts with a general one, the specific statute governs."<sup>100</sup> This concept will be discussed more fully below in Part II.D.

### *C. Plain Meaning as Applied to the Bribery Statute*

The language of the bribery statute, 18 U.S.C. § 201(c)(2) is clear and unambiguous. It states that:

Whoever directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness . . . shall be fined under this title or imprisoned for not more than two years, or both.<sup>101</sup>

Courts challenging the application of the bribery statute to plea agreements have generally done so on three grounds: (1) the government is not meant to be

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95. Section 201(c)(1) states that "[w]hoever, otherwise than as provided by law for the proper discharge of official duty . . ." 18 U.S.C. § 201(c)(1) (1994).

96. See generally *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

97. See *id.*

98. *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

99. *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990).

100. *United States v. Revis*, 22 F. Supp.2d 1242, 1251 (N.D. Okla. 1998) (citing *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961)).

101. 18 U.S.C. § 201(c)(2) (1994).

included in the statutory term "whoever," (2) offering leniency in exchange for testimony is not "anything of value," and (3) even if the plain language includes prosecutors, they should be excepted by the statute.<sup>102</sup>

The use of the word "whoever" in the bribery statute seems to be all-encompassing. The term neither implies nor expresses an exclusion of the prosecutor on the basis that he or one is not a "who." Indeed, as the court stated in *United States v. Revis*,<sup>103</sup> "it is too plain for argument that if a United States Attorney corruptly pays money to a prosecution witness for false testimony, such conduct would be covered under the bribery and gratuity prohibitions in 18 U.S.C. § 201."<sup>104</sup> The court went on to say that "once it is conceded that the statute covers such government conduct in at least one instance, the argument that the statute cannot apply to the government at all is lost."<sup>105</sup>

The Supreme Court in *Nardone v. United States*<sup>106</sup> held that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong."<sup>107</sup> In so holding, the Court construed § 605 of the Wiretapping Statute<sup>108</sup> to include investigators and prosecutors in its prohibition of divulging or publishing the content of interstate communications, where the statute said "no person" shall do so to "anyone."<sup>109</sup> More recently, the Court said that a federal agency is not a "person" within the meaning of a statute that allows removal to federal court when a civil suit involves "[a]ny officer of the United States or any agency thereof, or person acting under him . . . ."<sup>110</sup> The Court, however, stated that "'there is no hard and fast rule of exclusion' of the sovereign . . . and our conventional reading of 'person' may therefore be disregarded if 'the purpose . . . indicate[s] an intent, by the use of the term, to bring state or nation within the scope of the law.'"<sup>111</sup>

*Primate Protection League* can be distinguished from both *Nardone* and the bribery statute in that the phrase "person under him" was obviously referring to the antecedent "officer," and cannot grammatically be connected to the agency. Moreover, the purpose of the bribery statute is to prevent corruption through purchased testimony, and a plain language analysis holds that there is no more inclusive word or phrase than the word "whoever."

The majority in *Singleton II*,<sup>112</sup> however, excluded the federal government

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102. *E.g.*, *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

103. 22 F. Supp.2d at 1242.

104. *Id.* at 1254.

105. *Id.*

106. 302 U.S. 379 (1937).

107. *Id.* at 384.

108. 47 U.S.C. § 605 (1934). The Federal Wiretapping Prohibitions are now codified at 18 U.S.C. §§ 2515, 2518 (1994).

109. *Nardone*, 302 U.S. at 380-81.

110. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 79, 82-83 (1991).

111. *Id.* at 83 (citation omitted).

112. *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc), *cert. denied*, 527 U.S.

from the term “whoever” by finding the government to be an inanimate entity rather than a being, which the word “whoever” connotes.<sup>113</sup> This argument, though, clashes with The Dictionary Act,<sup>114</sup> which states that the definition of the word “whoever” includes corporations, companies, associations, firms, partnerships, and societies.<sup>115</sup> Moreover, Judge Lucero’s concurring opinion in *Singleton II* attempts to break down the majority’s reasoning altogether. In his opinion, Lucero notes that the purpose of the bribery statute, at least in part, is “to criminalize certain behavior of government officials.”<sup>116</sup> The government, itself, admitted that a prosecutor who corruptly bribes a witness with payment is subject to penalties under 18 U.S.C. § 201(b), even though the identifier is also “whoever.”<sup>117</sup> Judge Lucero states that “[i]f ‘whoever’ can refer to government agents in one part of the statute, then it surely can refer to government agents in § 201(c)(2).”<sup>118</sup> In comparing Judge Lucero’s argument with the majority’s reliance on the inanimate nature of the government, Judge Lucero may have the better argument.

The court in *Singleton II* also held that the government should not be included within the term “whoever” based on the role that the federal prosecutor plays.<sup>119</sup> The court found that the prosecutor, acting within the scope of his authority, is the alter ego of the government; therefore, the defense is actually attempting to subject the sovereign to the statute, which would be “patently absurd.”<sup>120</sup> The concurring opinion in *Singleton II*, however, correctly argued that the majority’s ruling “would transform virtually all federal ‘officers and agents’ relating to law enforcement and prosecution into alter egos of the government. . . .”<sup>121</sup> Moreover, the ruling cannot be squared with the Supreme Court ruling in *Nardone v. United States*<sup>122</sup> in which the Court found that the phrase “no person” included the government in a prohibition on wiretapping.<sup>123</sup> Using the logic from *Nardone*, federal prosecutors are not the alter ego of the government, but are agents whose conduct can sometimes invite punishment.

The majority’s argument, in *Singleton II*, that the prosecutor who gives cash payments to witnesses is acting beyond the scope of his employment and, therefore, is not acting as the alter ego of the sovereign is debatable.<sup>124</sup> The logic behind the court’s argument holds that a prosecutor acting directly contrary to

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1024 (1999).

113. *Id.* at 1300.

114. 1 U.S.C. § 1 (1994).

115. *See Singleton*, 165 F.3d at 1310 (Kelly, J., dissenting).

116. *Id.* at 1305 (Lucero, J., concurring).

117. *Id.*

118. *Id.*

119. *Id.* at 1299.

120. *Id.* at 1299-1300.

121. *Id.* at 1305 (Lucero, J., concurring).

122. 302 U.S. 379 (1937).

123. *Id.* at 381.

124. *See Singleton*, 165 F.3d at 1299-1303.



law is no longer an alter ego of the government and is subject to the criminal laws. A logical extension of the argument might be that since prosecutors are violating the plain meaning of the bribery statute when they offer leniency in exchange for testimony, the prosecutor could be subject to the law, but the government never could. The fact remains, however, that the government is subject to punishment for many acts done by prosecutors which are outside the scope of their authority. When a prosecutor mishandles evidence or obtains it illegally, the government is often punished in the form of exclusion.<sup>125</sup> Moreover, if a criminal defendant is convicted and the prosecutor is found to have paid a witness in cash, the government will surely be punished in the form of a reversal of the conviction.<sup>126</sup>

Because the term "whoever" in the bribery statute seems even more inclusive than the term "no person" in the wiretapping statute, and since it is not subject to the limitations of other language in the statute, there should be little doubt that prosecutors are subject to the bribery statute. Congress was attempting to wipe out the corruption that exists when a witness is bought off; the legislative history of the bribery statute admits as much.<sup>127</sup> The prosecutor should be punished for doing that which would get a defendant punished. Moreover, because it must be conceded that the statute applies to the prosecutor in cases where he pays money to a witness,<sup>128</sup> there can be no argument that the prosecutor is not subject to the statute at least in some instances.

The second challenge to the application of prosecutors to the bribery statute generally holds that offers of leniency are not "anything of value." The court in *United States v. Arana*<sup>129</sup> held that prosecutors may only recommend to the sentencing judge that a defendant receive leniency in exchange for substantial assistance.<sup>130</sup> The court reasoned that the sentencing judge is the only officer with the power to provide the defendant with anything of value, and that the prosecutor has nothing more than the power of persuasion.<sup>131</sup> Strong arguments can be made, however, that value does exist in exchanging leniency for testimony. Getting out of jail is surely a thing of value. Furthermore, witnesses believe that the prosecutor is in fact offering something of value because they are willing to testify after an agreement is made despite previously being unwilling.

Value can also be found in the prosecutor's offer by examining the sentencing guidelines and requirements. While the court is ultimately

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125. See generally *United States v. Blue*, 384 U.S. 251 (1966).

126. Punishments of this sort could possibly be compared with the civil notion of respondeat superior. Government employees acting outside of the scope of their authority, yet within the grounds of foreseeability, have nevertheless subjected the government to tort liability.

127. See *supra* Part II.A.

128. See *United States v. Revis*, 22 F. Supp.2d 1242, 1254 (N.D. Okla. 1998).

129. 18 F. Supp.2d 715 (E.D. Mich. 1998).

130. See *id.* at 720-22.

131. See *id.* at 721-22. The *Arana* court cited the holding in *United States v. Blanton*, 700 F.2d 298 (6th Cir. 1983), which held that the assurance of a public official that the witness would not lose his liquor license was not a "thing of value." *Arana*, 18 F. Supp.2d at 721.

responsible for the sentence, it can only grant leniency after a substantial assistance motion has been filed by the prosecutor.<sup>132</sup> The statutory filing requirements allow the prosecutor to stand between the court that wishes to grant leniency and the defendant who wishes to receive it. The prosecutor's role thus becomes that of a gatekeeper.<sup>133</sup> Moreover, the prosecutor's discretion as to whether to file a substantial assistance motion is virtually unreviewable.<sup>134</sup> Thus, the prosecutor is given a tool—something of value—to use against a defendant to get him to cooperate. This cooperation can lead to false testimony as the defendant may say anything to receive leniency. Indeed, evidence suggests that prosecutors sometimes use their substantial assistance power to manipulate the guidelines.<sup>135</sup> This tool and its potential for abuse clearly meets the bribery statute's "anything of value" criteria.

Prosecutors in the *Singleton I* panel decision argued that the statute should not apply to the plea deal at hand because the statute "had traditionally been interpreted to apply only to monetary payments . . . ."<sup>136</sup> However, the phrase "anything of value" has not been limited to monetary contributions. In fact, courts have ruled that the phrase must be construed broadly enough to encompass tangible and intangible benefits, not just money.<sup>137</sup> The *Singleton I* panel, itself, recognized that "courts have uniformly rejected arguments that 'anything of value' should be restricted to things of monetary, commercial, objective, actual, or tangible value."<sup>138</sup> In *United States v. Nilsen*,<sup>139</sup> the Eleventh Circuit ruled that

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132. See 18 U.S.C. § 3553(e) (1994) (stating that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as [the] minimum . . ."); see also U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1998) ("Upon motion of the government stating that the defendant has provided substantial assistance . . . the court may depart from the guidelines.").

133. See Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 217-18 (1997). Professor Lee argues that prosecutors control *not only* which defendants get to enter the gate of substantial assistance, but also whether the court will be allowed to depart from the guidelines; thus, they are a concierge as well as a gatekeeper. See *id.* at 234.

134. See *id.* at 251. Judicial review will be available only if the court finds that the refusal to file a motion was based on an unconstitutional motive or not reasonably related to a "legitimate governmental objective." *Id.*

135. See *id.* at 236. Prosecutors have admitted using substantial assistance motions to get the court to depart from guidelines when the defendant is sympathetic even if they have not substantially assisted the prosecutor. See *id.*

136. Marcia Coyle & David E. Rovella, *Stunning Rulings Curtail Prosecutors' Power—Testimony Can't Be Bought; Immunity's Scope Widened*, NAT'L L.J., July 20, 1998, at A1.

137. See *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992).

138. *United States v. Singleton*, 144 F.3d 1343, 1349 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); see also *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996), *aff'd sub nom. Salinas v. United States*, 522 U.S. 52 (1997) (holding that "anything of value" includes transactions involving intangible items); *United States v. Schwartz*, 785 F.2d 673, 680-81 (9th Cir. 1986) (holding that the proper construction of the

the conduct and expectations of a defendant can establish whether an intangible objective should be considered a "thing of value."<sup>140</sup> Moreover, the Fifth Circuit ruled in *United States v. Cervantes-Pacheco*<sup>141</sup> that the promise of intangible benefits imports as great a threat to a witness's truthfulness as a cash payment.<sup>142</sup> This holding by the Fifth Circuit supports the theory that benefits lead to corruption which is the basis for the bribery statute.

If the courts are to further the purpose of preventing corruption, a broad construction of the bribery statute is required. Specifically, the focus should be placed on the value that the defendant subjectively attaches to the items to be received.<sup>143</sup> When subjective value is measured, it becomes clearer that the prosecutor's offer of leniency is something of value because the witness is motivated to testify when he was not previously so inclined. Therefore, the *Singleton* panel correctly ruled that "the government had impermissibly promised [the witness] something of value—leniency—in return for his testimony."<sup>144</sup>

The plain meaning doctrine also suggests that, when reading § 201 as a whole, federal prosecutors should be subjected to the bribery statute for offers of leniency. Section 201(c)(1) of the bribery statute opens by excluding from the statute acts done in the "discharge of official duty."<sup>145</sup> However, § 201 (c)(2) contains no similar phrase.<sup>146</sup> This would indicate that § 201(c)(2) should not exclude acts done in the discharge of official duty. The omission prevents the prosecutor from arguing that although he was acting in his official capacity and therefore could not be subject to the statute. In reality, the statute includes prosecutors even if they are not performing their official duty correctly.<sup>147</sup>

Furthermore, § 201(c)(2) "contains no requirement that [bribery] be done solely with the intent of influencing the witness's testimony—only that it be 'for or because of the testimony under oath or affirmation given or to be given by such person as a witness . . . .'"<sup>148</sup> The language of § 201(b)(3) reenforces the

bribery statute included the subjective value that the defendant attached to the prosecutor's offer), *rev'd*, 853 F.2d 768 (9th Cir. 1988).

139. 967 F.2d 539 (11th Cir. 1992).

140. *Id.* at 543.

141. 826 F.2d 310 (5th Cir. 1987).

142. *See id.* at 315.

143. *See United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986); *see also United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983).

144. *United States v. Singleton*, 144 F.3d 1343, 1344 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), and *cert. denied*, 527 U.S. 1024 (1999).

145. 18 U.S.C. § 201(c)(1) (1994).

146. *See id.* § 201(c)(2).

147. Federal prosecutors who act in their official capacity perform the broad designations charged to their office, namely, the investigation and prosecution of offenders. Acting outside the scope of their duty pertains to using improper means to accomplish the investigation and prosecution of offenders.

148. J. Richard Johnston, *Paying the Witness—Why Is It OK for the Prosecution, but Not the Defense?*, 12 CRIM. JUST., Winter 1997, at 21-22 (quoting 18 U.S.C. § 201(c)(2) (1994)).

prohibition of giving of anything of value "with intent to influence the testimony" of the witness.<sup>149</sup> The omission from the former section of any intent language suggests the absence of any intent requirement, especially in light of the fact that the latter section expressly includes an intent requirement. However, the Eleventh Circuit has concluded that § 201(c)(2) does contain an intent requirement because "[g]iving something of value 'for or because of' a person's testimony obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion."<sup>150</sup> In contrast, a possibly more appealing argument holds no intent requirement exists in § 201(c)(2) because "[t]he gratuity prohibitions collected under § 201(c) . . . contain no requirements of corruption and intent to influence the receiver, and Congress attached concomitantly lesser penalties to their violation."<sup>151</sup>

Further evidence of the legislature's intent to bring offers of leniency by prosecutors into the bribery statute is provided by a close examination of 18 U.S.C. § 201(c) and § 201(d). Congress made an exception to the bribery statute by allowing payment for a witness's travel expenses, subsistence, and lost time.<sup>152</sup> However, the exception does not include payment for testimony, so it should not be implied. J. Richard Johnston, scholar of the bribery statute as it pertains to leniency deals, commented on the interplay between §§ 201(c) and (d) stating that:

The fact that intent to influence testimony is not an element of the offense under § 201(c)(2) would seem to follow by necessary implication from the provisions in § 201(d), which provides:

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or, in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.<sup>153</sup>

Because Congress did not include an exception for prosecutors who offer leniency in exchange for testimony when Congress created exceptions for travel expenses, lost time, and lodging, a plain language analysis allows the conclusion

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149. 18 U.S.C. § 201(b)(3).

150. Johnston, *supra* note 148 (quoting *United States v. Moody*, 977 F.2d 1420, 1425 (11th Cir. 1992)).

151. *United States v. Singleton*, 144 F.3d 1343, 1351 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999); *see also United States v. Irwin*, 354 F.2d 192, 197 (2d Cir. 1965).

152. *See* 18 U.S.C. § 201(d) (1994).

153. Johnston, *supra* note 148, at 22 (quoting 18 U.S.C. § 201(d)).

that offers of leniency clearly involve bribery.<sup>154</sup> Indeed, when the Senate introduced bills during the 105th Congress attempting to amend the bribery statute to allow prosecutors to offer leniency in exchange for testimony, they proposed the inclusion of such language in subsection (d).<sup>155</sup> The Supreme Court has stated that the courts "are not at liberty to create an exception where Congress has declined to do so."<sup>156</sup> Because Congress has not created an exception in the bribery statute, the courts should refrain from creating one in Congress's stead.

*D. Is the Government Excepted from the Bribery Statute?*

The final challenge to the application of federal prosecutors to the bribery statute comes via common law exceptions. Principally, courts have traditionally held that either (1) general laws do not apply to the government unless the statute expressly so provides, or (2) specific sentencing statutes overrule the general bribery statute.

The district court in *Arana*<sup>157</sup> stated that the Supreme Court "has long recognized a canon of construction which provides that statutes which tend to restrain or diminish the powers, rights, or interests of the sovereign do not apply to the government or affect governmental rights unless the text expressly includes the government."<sup>158</sup> This doctrine goes back to at least 1873.<sup>159</sup> As early as 1937, however, the Supreme Court recognized that this canon applies only in two classes of cases. In *Nardone*,<sup>160</sup> the Court held that "the cases in which [the exception from general statutes] has been applied fall into two classes. The first is where an act, if not so limited, would deprive the sovereign of a recognized or established prerogative title or interest."<sup>161</sup> The Court noted that the classic instance of this type involved the exemption of the government from general statutes of limitation.<sup>162</sup> The second class excepts the government "where a

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154. The Tenth Circuit held that the omission of leniency offers by prosecutors from the exceptions stated in subsection (d) was important in that without the exceptions, subsection (c)(2) would prohibit paying witnesses for their time. See *Singleton*, 144 F.3d at 1351-52. Moreover, because leniency offers in exchange for testimony were not explicitly included in subsection (d), those offers are, indeed, prohibited. See *id.*

155. See S. 2484, 105th Cong. § 2304 (1998).

156. *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); see also *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) (stating that "courts cannot with ease presume ratification of that which Congress forbids."); *Brogan v. United States*, 522 U.S. 398, 401 (1998) (holding that "courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so.").

157. *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

158. *Id.* at 716.

159. See generally *United States v. Herron*, 87 U.S. 251, 263 (1873).

160. 302 U.S. 379 (1937).

161. *Id.* at 383.

162. See *id.*

reading which would include such officers would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm.”<sup>163</sup>

Addressing the first class of cases, the Court in *Singleton II* held that the “ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government.”<sup>164</sup> Thus, the government cannot be subject to the statute. The dissent in that case found fault with the majority’s erroneous conflation of two concepts: “the vested sovereign prerogative of the government to prosecute and the obvious non-prerogative of how to prosecute.”<sup>165</sup> Furthermore, the dissent noted that “[o]nce the government falls into the crucible of the trial, the government, like the defendant, must follow the generally applicable rules governing the process.”<sup>166</sup> Since the bribery statute was enacted to protect the integrity of the judicial process, the government should not be excepted from the statute.

The application of the bribery statute to federal prosecutors would not deprive the government of an established title or interest. Although courts have said that plea deals do not violate due process, those holdings did not stand for the proposition that merely because pleas escape due process, they are a governmental entitlement. Rather, the decisions reflect the notion that the government has not yet violated the Constitution.<sup>167</sup> Moreover, the Court in *Nardone* stated that the exclusion of the government from general statutes “is less stringently applied where the operation of the law is upon the agents or servants of the government rather than on the sovereign itself.”<sup>168</sup> The concurring opinion in *Singleton II* saw a danger in classifying all government employees as alter egos of the sovereign and, therefore, immune from criminal statutes.<sup>169</sup>

Federal prosecutors should be classified as agents of the sovereign rather than as the sovereign, itself. A contrary finding would render cases like *Nardone*, which hold federal officers liable for illegal wiretapping even when

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163. *Id.* at 384. In contrast, however, the district court in *Arana* believed that *Nardone* read the canon too narrowly and that the classes of cases that excluded the government was not a conclusive list. See *United States v. Arana*, 18 F. Supp.2d 715, 717 (E.D. Mich. 1998). Rather, the court felt that other classes might warrant excluding the government from general statutes. See *id.* This argument is weakened, however, because no new classes have been added to the canon in sixty years.

164. *United States v. Singleton*, 165 F.3d 1297, 1302 (10th Cir.) (en banc), *cert. denied*, 529 U.S. 1024 (1999).

165. *Id.* at 1301 (Kelly, J., dissenting).

166. *Id.* at 1312 (Kelly, J., dissenting).

167. See *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that the use of government informants does not necessarily violate due process); *United States v. Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (holding that a witness’ testimony that was based on a contingency agreement did not per se violate due process). See generally the discussion on due process concerns, *supra* Part I.C.

168. *Nardone v. United States*, 302 U.S. 379, 383 (1937).

169. See *supra* text accompanying note 121.



done within the scope of authority, mere surplusage.<sup>170</sup> Allowing them to obtain a conviction while other defendants would be sentenced to jail for similar conduct would throw the rule of law and the credibility of the justice system on their collective ears. The *Singleton I* court recognized the potential for injustice when it stated that the bribery statute "does not restrict any interest of the sovereign itself; it operates only upon an agent of the sovereign, limiting the way in which that agent carries out the government's interests."<sup>171</sup> The court went on to say that "[t]here is no presumption that regulatory and disciplinary measures do not extend to such officers."<sup>172</sup> Finally, even if the statute were to infringe upon a government right, the government would nevertheless be subject to it because the statute's purpose is to prevent fraud, injury, and wrong.<sup>173</sup>

Courts refusing to apply the bribery statute to federal prosecutors who offer leniency in exchange for testimony generally attack its application by the second class of cases noted in *Nardone*, that it would work an obvious absurdity.<sup>174</sup> Such absurdity exists when comparing the bribery statute with three statutes that allow lesser sentences for substantial assistance including testimony. These statutes are also used by courts as examples of specific statutes that overrule the general bribery statute.

The first statute involves §§ 6001-6005 of Title 18 of the United States Code, which authorize federal prosecutors to grant immunity to unwilling witnesses in order to encourage them to testify.<sup>175</sup> The *Arana* court found that an absurdity exists in that § 201 criminalizes giving anything of value while §§ 6001-6005 allow the granting of immunity, a seeming contradiction.<sup>176</sup> Because courts have a duty to harmonize apparently conflicting statutes whenever possible,<sup>177</sup> the only way to avoid an absurd result from existing is to prove an absence of conflict. Although the §§ 6001-6005 allow the granting of immunity for testimony, those statutes can operate fully and independently. The grant of immunity is actually done in exchange for the witness' Fifth Amendment right against self-incrimination, not for his testimony. Since the witness remains free to testify or not to testify, the bribery statute has not been violated, and the witness has not been coerced to give potentially false statements. Furthermore, immunity only protects a witness from having his own testimony used against him. On the other hand, leniency in exchange for testimony provides the defendant with a self-serving incentive to testify falsely against others, especially because the prosecutor becomes the primary door through which a defendant can obtain

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170. See *United States v. Singleton*, 165 F.3d 1297, 1305 (10th Cir.) (en banc) (Lucero, J., concurring), *cert. denied*, 527 U.S. 1024.

171. See *United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d at 1297, *and cert. denied*, 527 U.S. at 1024.

172. *Id.* (quoting *United States v. Arizona*, 295 U.S. 174, 184 (1935)).

173. See *id.*; see also HENRY CAMPBELL BLACK, *INTERPRETATION OF LAWS* 97 (2d ed. 1911).

174. See *United States v. Arana*, 18 F. Supp.2d 715 (E.D. Mich. 1998).

175. See 18 U.S.C. §§ 6001-05 (1994).

176. See *Arana*, 18 F. Supp.2d at 718.

177. See *Singleton*, 144 F.3d at 1348.

leniency.<sup>178</sup> Admittedly, there is but a fine distinction in allowing prosecutors to grant immunity while refusing to allow them to recommend leniency. However, the distinction is important. Testimony induced by leniency encourages the witness to testify in a light favorable to the prosecution, thus setting up a risk of unreliable testimony. When immunity is granted, the witness is free to speak openly with no fear of penalty. The critical distinction lies in the placement of the motivation. Once a witness is given immunity, he is no longer obligated to the prosecutor in any way. Since immunity does not hold the same dangers of coerced, potentially false testimony, it makes sense that courts are allowed to offer immunity while prosecutors cannot offer leniency for testimony.

The panel in *Singleton* explained their finding that no inconsistency existed between the laws by saying that the government has no power to offer immunity for testimony; rather, the court is the one actually granting immunity.<sup>179</sup> While this is true, the court may have erred in its reasoning and weakened its argument by its stance that the court, rather than the prosecutor, grants immunity. This is especially true when the court previously held that "anything of value" includes recommendations by the prosecutor, even though the court has the sole authority to grant leniency. Where the power of persuasion is held to be something of value when pertaining to leniency, it should also be considered of value when pertaining to immunity.

However, the *Singleton* panel was correct in ruling that both statutes can operate independently, and therefore, no absurdity is worked. That court stated that both statutes "manifest a Congressional intent to allow testimony obtained by the court's grant of immunity, but to criminalize the gift, offer, or promise of any other thing of value for or because of testimony."<sup>180</sup> As previously stated, immunity contains none of the dangers of coercion that come with offers of leniency for testimony. Because the two statutes can coexist without conflict, no absurdity is worked.

The other two statutes that have been used to challenge the viability of applying the bribery statute to prosecutors who offer leniency in exchange for testimony include 18 U.S.C. § 3553 and section 5k1.1 of the U.S. sentencing guidelines. The federal criminal sentencing statute, 18 U.S.C. § 3553(e) states that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another. . . ." <sup>181</sup> The court in *United States v. Revis*<sup>182</sup> interpreted this section, along with the Government's mandate under 28 U.S.C. § 994 that a defendant's substantial assistance be considered when imposing a sentence, to mean that substantial assistance includes testimony.<sup>183</sup> The court argued that

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178. See Lee, *supra* note 133, at 207.

179. See *Singleton*, 144 F.3d at 1348.

180. *Id.*

181. 18 U.S.C. § 3553(e) (1994).

182. 22 F. Supp.2d 1242 (N.D. Okla. 1998).

183. See *id.* at 1258.

because the statute uses the disjunctive when speaking of "investigation" or "prosecution," and since "investigation" means out of court statements, then "prosecution" must mean testimony given in court.<sup>184</sup>

Even if the *Revis* court's interpretation of § 3553(e) does include testimony, it does not necessarily allow the prosecutor to promise leniency for it.<sup>185</sup> The statute, however, may not contemplate testimony as the exclusive means of substantially assisting a prosecution. When a prosecutor takes a case to trial, he is not always in full command of all aspects of the evidence. Indeed, he may sometimes lack the evidence to convict at the time the grand jury returns an indictment against a defendant. By using the disjunctive "or" between "investigation" and "prosecution," § 3553(e) expressly contemplates the situation where not all persons who are assisting a prosecution have assisted in the investigation. Testimony exchanged for leniency is not necessarily included; more important is the search for truth, and § 3553(e) sets out to allow a downward departure from a statutory minimum sentence for the witness who aids in that search for the truth.

The best argument for the inclusion of testimony within the bounds of substantial assistance lies in the government's sentencing guidelines. Specifically, section 5k1.1 of the U.S. sentencing guidelines defines substantial assistance more clearly than 18 U.S.C. § 3553(e).<sup>186</sup> Section 5k1.1 allows, on a government motion, the departure from the general sentencing guidelines. Furthermore, the section defines the types of conduct may be included under substantial assistance. Subsection (a)(2) states that the appropriate sentence reduction should be determined by, among other things, "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant."<sup>187</sup> Although this section contemplates testimony as a form of substantial assistance, two factors help reconcile this section with the bribery statute and prevent absurdity.

First, the sentencing guidelines were not drafted by legislators; they are guidelines promulgated by a commission. Although the definitions that place testimony within the "substantial assistance" language may control throughout the guidelines, the definition does not make reference to the United States Code and should not be presumed to read the same way when pertaining to statutes. Second, the provision for granting departure from the sentencing guidelines for truthful, complete, and reliable testimony pertains to the sentence handed down

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184. *Id.* Curiously, the court claims that the plain language of the statute contemplates testimony as being part of assistance in prosecution. The statute does not mention testimony, and there are many ways a witness-defendant can assist the prosecutor in a prosecution without actually testifying.

185. *See supra* notes 175-80 and accompanying text. The disparity between leniency and immunity remains.

186. *See* U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1996). The section is part of the criminal sentencing guidelines promulgated by an independent committee, giving clarity to the broad Congressional enabling provisions set forth in 28 U.S.C. § 994 (1994).

187. U.S. SENTENCING GUIDELINES MANUAL § 5k1.1(a)(2).

by the court after the assistance has been given. The guidelines contain no permission to induce testimony by offering leniency in exchange.

An Oklahoma District Court overlooked the importance of this last point when it ruled on the case of *United States v. Revis*.<sup>188</sup> That court held that 18 U.S.C. § 3553(e) and section 5k1.1 of the sentencing guidelines were specific statutes that authorized the use by the prosecutor of plea deals in exchange for testimony even though the general bribery statute pertained to the prosecutor in plain language.<sup>189</sup> In actuality, the downward departure statute (18 U.S.C. § 3553(e)) and the sentencing guidelines were put in place for the benefit of judges, who are responsible for sentencing the defendant.<sup>190</sup> Section 5k1.1 clearly speaks to judges by stating that upon government motion that the defendant has substantially assisted the investigation or prosecution, "the court may depart from the guidelines."<sup>191</sup> Indeed, the entire body of the sentencing guidelines was meant for the post-prosecution of defendants, giving judges direction as to the sentence imposed. The guidelines were not meant to empower prosecutors, especially in a way that is contrary to the plain language of a criminal statute.

Thus, it seems absurd not to apply the bribery statute to prosecutors who offer deals in exchange for testimony, but to allow the sentencing guidelines meant for judges to be used in a way that empowers prosecutors to act in direct conflict with a criminal statute. Because the sentencing guidelines were enacted to aid judges, their influence over the criminal justice system should remain within the judicial branch of government.<sup>192</sup>

Another argument made by courts that the application of the bribery statute to prosecutors creates an absurdity involves a conflict as to the actual violators of the statute. The court in *Arana*<sup>193</sup> found that the bribery statute should not be applied to prosecutors because, among other reasons, the actual perpetrators of the statute were the judges who offered leniency.<sup>194</sup> That court correctly stated that it would be absurd to subject judges to the bribery statute.<sup>195</sup> Rather than simply label it an absurdity to say judges can violate the bribery statute by offering leniency, the court could have recognized that the sentencing guidelines specifically allow judges to depart from the guidelines when substantial assistance has been given.<sup>196</sup> In fact, section 5k1.1 speaks directly to the situation

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188. 22 F. Supp.2d 1242 (N.D. Okla. 1998)

189. *See id.* at 1261.

190. *See id.* at 1258.

191. U.S. SENTENCING GUIDELINES MANUAL § 5k1.1 (1996).

192. Federal prosecutors, as members of the United States Attorney's office in the Executive branch of the government, should not be allowed to use a guideline intended for the Judicial branch to justify the violation of a criminal statute.

193. 18 F. Supp.2d 715 (E.D. Mich. 1998).

194. *See id.* at 719.

195. *See id.*

196. *See* U.S. SENTENCING GUIDELINES § 5k1.1; *see also supra* note 191 and accompanying text.

and is better used to allow judges to depart from sentencing guidelines rather than as a way to allow prosecutors to exchange testimony for leniency.<sup>197</sup>

The panel in *Singleton I* addressed an additional argument made in support of exempting prosecutors from the bribery statute. That argument is that “[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.”<sup>198</sup> The court in *Singleton I* dismissed this argument in the case of prosecutors offering leniency in exchange for testimony based on the historical scope of the doctrine and the reasonableness of the prosecutor’s action.<sup>199</sup> First, while acknowledging the fact that federal appellate courts have allowed police investigating conduct to go beyond the bounds of the law as long as it is legitimate and reasonably necessary,<sup>200</sup> the court in *Singleton I* “decline[d] to expand the meaning of ‘enforcement action’ beyond its historical scope of detection, apprehension, and prevention of crime.”<sup>201</sup> The court found that federal prosecutors are not officers of the law, and because the exception was meant to cover only field enforcement operations such as work by police officers, federal prosecutors do not fit this exception. Indeed, the court in *Singleton I* stated that they “found no case in which prosecutors, in their role as lawyers representing the government after the initiation of criminal proceedings, have been granted a justification to violate generally applicable laws.”<sup>202</sup>

The court also found the prosecutor’s offer of leniency in exchange for testimony to be manifestly unreasonable, and therefore, in violation of the allowance for “reasonable enforcement actions.”<sup>203</sup> The court held that “[r]easonable law enforcement actions stop with detecting crime and observing enough to prove it. The government’s statutory violation unreasonably exceeds this purpose, and is the more egregious because the intended product of the violation is testimony presented in court.”<sup>204</sup> Since prosecutors who offer leniency in exchange for testimony are not engaging in reasonable enforcement actions, they should not be excepted from the bribery statute.

The final argument made by the government involves the exception of federal prosecutors from state ethics rules. Section 3.4(b) of the American Bar Association’s Model Rules of Professional Conduct states that “A lawyer shall

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197. Although testimony is not actually being exchanged for leniency, the prosecutor must move to allow a downward departure from the guidelines before the court can grant leniency.

198. *Brogan v. United States*, 522 U.S. 398 (1998). The Court’s example showed the legality of undercover narcotics officers who made false statements to drug peddlers.

199. See *United States v. Singleton*, 144 F.3d 1343, 1353-54 (10th Cir. 1998), *rev’d en banc*, 165 F.3d 1297 (10th Cir.), and *cert. denied*, 527 U.S. 1024 (1999).

200. See *id.* at 1353; see also *United States v. Mosley*, 965 F.2d 906, 908-15 (10th Cir. 1992) (holding that only a “particularly egregious” level of illegal government involvement or coercion can give rise to improper conduct on the part of the government).

201. *Singleton*, 144 F.3d at 1353-54.

202. *Id.* at 1353.

203. *Id.* at 1354.

204. *Id.*

not . . . offer an inducement to a witness that is prohibited by law.”<sup>205</sup> In the *Singleton I* case, the panel, using a substantially similar ethics rule, held that the government violated the rule.<sup>206</sup> The Department of Justice, however, maintains that its prosecutors are not subject to state ethics rules in the states in which the prosecutors appear, even if the prosecutor is a member of that state’s bar.<sup>207</sup>

The government’s position on this matter, however, is untenable. Rules governing the conduct of lawyers make no distinction between prosecutors and defense counsel in prohibiting inducements to witnesses.<sup>208</sup> Moreover, Congress passed a bill into law on October 28, 1998 making it clear that federal prosecutors are subject to state ethics rules to the same extent as any other attorney with a state license.<sup>209</sup> Inducing testimony by offering leniency is a violation of the plain language of the bribery statute, and it is also a violation of state ethics rules. Because federal prosecutors are subject to state ethics rules, they could violate both the bribery statute and ethics’ rules by the same act. This violation of ethics rules becomes quite serious as it can subject the federal prosecutor to discipline regardless of the testimony would be excluded at trial.

Federal prosecutors who offer leniency in exchange for testimony should be subject to the bribery statute. Because no established title or interest exists in prosecutors violating the bribery statute and the prosecutors are mere agents of the sovereign and not the sovereign itself, they fail to fall within the first class of *Nardone* cases. Furthermore, since no absurdity is worked in applying the statute to prosecutors, they do not fall within the second class of *Nardone* cases. Although §§ 6001-05 of Title 18 allow the granting of immunity for a relinquishment of the right against self-incrimination, a distinction can be made between immunity and leniency. The granting of immunity holds none of the dangers of coerced, potentially false testimony that is found in exchanges of leniency for testimony. Furthermore, although § 3553(e) of Title 18 allows the court to grant leniency upon evidence of substantial assistance, it does not necessarily contemplate testimony as substantial assistance. U.S. Sentencing Guidelines section 5k1.1 allows a judge to depart from the sentencing guidelines when substantial assistance has been rendered; however, it does not contemplate granting prosecutors a power to coerce testimony by exchanging leniency for it. Lastly, the Tenth Circuit’s argument that prosecutors are alter egos of the sovereign and, therefore, an absurdity results when applying the statute to the sovereign can be refuted.<sup>210</sup> At the end of the day, it is wrong to call the

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205. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(b).

206. See *Singleton*, 144 F.3d at 1358-59 (construing KAN. RULE OF PROFESSIONAL CONDUCT Rule 3.4(b)).

207. See Johnston, *supra* note 148, at 23-24.

208. See *id.* at 23.

209. See Pub. L. 105-277, 112 Stat. 2681 (codified at 28 U.S.C. § 530); see also Harvey Berkman, *Thornburgh Rule Is Nixed—It Is No Longer OK for Federal Prosecutors to Flout State Ethics Rules*, NAT’L L.J., Nov. 2, 1998, at A8.

210. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir.) (en banc) (Lucero, J., concurring), *cert. denied*, 527 U.S. 1024 (1999).



prosecutor's action a plea bargain when the same action would be called a bribe if done by the defendant.

### III. IS SUPPRESSION THE PROPER REMEDY WHEN FEDERAL PROSECUTORS VIOLATE THE BRIBERY STATUTE?

#### *A. Suppression and the Due Process Cases*

In due process cases,<sup>211</sup> courts generally hold that exclusion of testimony received in exchange for leniency is not the proper remedy.<sup>212</sup> The courts, instead, place great confidence in the value of cross-examination and a properly instructed jury to weigh the witness's credibility. Courts generally place little importance on the possibility that jurors might overlook the crimes of the witness. In fact, the jury may conceivably implicate the defendant more quickly based on his association with a shady witness who has committed crimes himself. The jury, in certain instances, may well decide to convict the defendant because he is the only person upon whom they can inflict punishment.

The main difference between due process cases and the bribery statute is that courts have heretofore ruled on the exclusionary rule in terms of what is fair to the defendant. In statutory violations, however, where the federal prosecutor has committed wrongdoing, the proper focus is on deterring the conduct rather than ensuring due process for the defendant. While notice to the defendant of the plea bargain and the ability to cross-examine may repair due process, these devices will not deter the prosecutor from denigrating the judicial process by making deals in exchange for testimony. If anything, the failure of the court to suppress the testimony will encourage the prosecutor to expand the practice. Because failure to suppress testimony can be an affirmation of the practice of offering deals in exchange for testimony, the use of notice and opportunity for cross-examination should be the minimum allowable standards in which to maintain a defendant's due process rights. The court should consider whether the procedure demeans the judicial process even though it may satisfy minimum due process standards. The first question, however, must be whether the court has the power to suppress the testimony if and when it does find that the procedure is a denigration of the judicial process.

#### *B. The Inherent Power of Courts to Ensure the Integrity of the Judicial Process*

In many instances, the Supreme Court has validated the use of judicially imposed exclusionary rules. In fact, it is well settled that the courts have an inherent power to control the integrity of the process. In *United States v. Blue*,<sup>213</sup> the Court confirmed this inherent power by stating that they have "recognized or developed exclusionary rules where evidence has been gained in violation of the

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211. See *supra* Part I.C.

212. See, e.g., *Hoffa v. United States*, 385 U.S. 293 (1966).

213. 384 U.S. 251 (1966).

accused's rights under the Constitution, federal statutes, or federal rules of procedure."<sup>214</sup> In *Blue*, a prosecutor's use of evidence violated the defendant's Fifth Amendment right against self-incrimination, but the Court held that judicially imposed exclusion would be proper in cases of statutory violations, as well.<sup>215</sup> In fact, the Court stated expressly in *McNabb v. United States*<sup>216</sup> that the principles governing the admissibility of evidence in federal trials have not been restricted to constitutional violations.<sup>217</sup>

Opponents of exclusionary practices argue that where the legislature sets out a remedy, courts cannot make up a different one. The Second Circuit, in 1987, refused to suppress evidence when the government violated a statute for which there was a statutory remedy.<sup>218</sup> The *Singleton* panel, however, distinguished the Second Circuit case by stating that the policy of Congress in enacting the bribery statute was to protect the courts and parties from unreliable evidence. Unlike the issue in *Benevento*, violation of the bribery statute directly relates to the taint and reliability of evidence.<sup>219</sup> Moreover, federal prosecutors can hardly be expected to prosecute themselves for violating the bribery statute. Exclusion of testimony, even in the face of a statutory remedy, is proper and effective at removing unreliable evidence.

Judicially imposed exclusion has been utilized many times in the name of preserving the integrity of the judicial process. Simply put, the judiciary must have the authority to protect its integrity in order to execute its functions. As early as 1888, the Supreme Court noted that courts necessarily have inherent equitable power over their own process to prevent abuses, oppression, and injustices.<sup>220</sup> More recently, a district court in New York maintained the inherent authority of the courts to prevent abuses in the case of *Fayemi v. Hambrecht*.<sup>221</sup> In that case, the court suppressed illegally obtained evidence in an employment discrimination suit. In considering the appropriate sanction for wrongfully obtained evidence, the court took into account two factors: (1) the severity of the wrongdoing and (2) the prejudice to the adversary.<sup>222</sup> The court found the first factor important because it sought to deter future conduct of a similar nature by the violating party.<sup>223</sup> The second factor ensured that the wrongful acquisition

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214. *Id.* at 255; see also *United States v. Payner*, 447 U.S. 727 (1980) (relying on the Court's supervisory power to exclude evidence because it promoted judicial integrity in its flexibility of formulation of the relevant and important objectives).

215. See *Blue*, 384 U.S. at 255.

216. 318 U.S. 332 (1943).

217. See *id.* at 340-41.

218. See *United States v. Benevento*, 836 F.2d 60, 69-70 (2d Cir. 1987).

219. See *United States v. Singleton*, 144 F.3d 1343, 1360 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *cert. denied*, 527 U.S. 1024 (1999).

220. See *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

221. 174 F.R.D. 319, 324 (S.D.N.Y. 1997).

222. See *id.* at 325.

223. See *id.*

of evidence did not benefit the acquiring party.<sup>224</sup> Ultimately, the court found that Mr. Fayemi's attempt to introduce evidence that was obtained by illegally accessing private areas of the defendant's property without permission was serious enough to warrant suppression.<sup>225</sup>

When the court applies its inherent power to federal prosecutors who violate the bribery statute, suppression becomes the best means of ensuring future compliance. An analysis of the *Fayemi* factors shows a seriousness at least equal to that of accessing private areas. Mr. Fayemi attempted to submit evidence that would further the search for truth, while federal prosecutors, by making deals, set up an incentive to act with bias, possibly masking the truth. Furthermore, the plain language of the bribery statute is violated when prosecutors negotiate plea deals in exchange for testimony; thus, the wrongdoing by the prosecutor is severe. The defendant is also prejudiced by the introduction of testimony where the witness had an incentive to lie. Although courts have found that due process is not offended, that is but a minimum standard, and the court should limit the availability of witness testimony that has been exchanged for leniency.

### C. *Exclusion of Evidence as a Remedy for Statutory Violations*

The Supreme Court has suppressed illegally obtained evidence not only when it violated the Constitution, but also when it violated a statute.<sup>226</sup> Furthermore, courts may be allowed to suppress evidence even when Congress is silent. In *McNabb v. United States*,<sup>227</sup> the Court reversed convictions because the suspects were not taken before a United States Commissioner or a judge, in violation of federal statute. The Court felt the interests of justice were best served by excluding the inculpatory statements made by the defendants while being held illegally.<sup>228</sup> Explaining its holding, the Court stated that judicial supervision of criminal justice "implies the duty of establishing and maintaining civilized standards of procedure and evidence . . . guided by considerations of justice . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."<sup>229</sup>

The Supreme Court has dealt with judicial exclusion for statutory violations on a number of occasions.<sup>230</sup> In *Nardone*,<sup>231</sup> the Court reversed a conviction

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224. *See id.*

225. *See id.*

226. *See supra* Part III.B.

227. 318 U.S. 332 (1943).

228. *See id.* at 341-42.

229. *Id.* at 340-41.

230. *See, e.g., Sabbath v. United States*, 391 U.S. 585 (1968) (holding that unlawful police entry into a dwelling even with a warrant results in inadmissibility of the evidence obtained); *Miller v. United States*, 357 U.S. 301 (1958) (police forcing their way through a chained door was unlawful and warranted exclusion of seized evidence).

231. 302 U.S. 379 (1937).

obtained by prosecutors with the help of illegal wiretapping.<sup>232</sup> Wiretapping was illegal under the Communications Act of 1934.<sup>233</sup> At the time, the statute contained no provision for the courts to suppress evidence obtained in violation of the statute, but the Court ordered suppression nevertheless.<sup>234</sup> Regarding the challenge that Congress never intended federal agents to be hampered in the detection and punishment of crime, the Court said, "Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty."<sup>235</sup> Although federal prosecutors are only violating a statute rather than the Constitution, the distinction is irrelevant. There is ample precedent permitting the exclusion of evidence obtained in violation of statutes.

The viability of excluding testimony obtained in exchange for leniency is reenforced by scholars. In fact, the practice has become so ingrained and commonplace in the judicial process, it has prompted George E. Dix of the University of Texas School of Law to write that courts have accepted that exclusion is the usual remedy, even in non constitutional illegalities, so "Congress must, therefore, have assumed that an exclusionary remedy would be applied if the legislation was silent on the matter."<sup>236</sup> Whether Congress had in mind the exclusion of testimony when the bribery statute was violated remains to be seen; it is significant that the principle reason behind the adoption of the exclusionary rule was the government's failure to observe its own laws.<sup>237</sup> Exclusion of testimony promotes judicial integrity, controls the government litigator, and is the proper remedy when the bribery statute has been violated.

It can be argued that because Congress specifically included a punishment in the bribery statute, it would have included exclusion had it desired. However, along with the fact that exclusion is the normal remedy for violations of statutes that stand to denigrate the judicial process, it is also true that courts are in a better position to fashion rules that guide the judicial process. Courts deal with evidentiary matters every day and are well equipped to use their given discretion to adjust to any new situations. Courts are also in a better position to develop common law doctrine through the more particular process of case by case analysis and precedent. Congress, on the other hand, must enact a broad law, then repeatedly revisit the law in future years in order to adjust to the demands

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232. See *id.* at 384-85.

233. See 47 U.S.C. § 605 (1934). The current version of the wiretapping statute does contain a provision prohibiting the use as evidence of intercepted wire or oral communications done in violation of law. See 18 U.S.C. § 2515 (1994).

234. See *Nardone*, 302 U.S. at 383-85.

235. *Id.* at 383.

236. George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 80-81 (1989).

237. See *United States v. Russell*, 411 U.S. 423, 430 (1973) (rejecting the exclusion of evidence leading to a drug conviction due, in part, because the undercover agent who infiltrated the enterprise did not break any laws).

of legislators and the public.

The political nature of passing laws for the exclusion of evidence tends to keep the legislature away from the area altogether. There is a public desire to be tough on crime. Many attempts at legislating the exclusion of testimony can be seen by constituents as being soft on crime. Legislators generally do not like to act in unpopular ways. Furthermore, statutes that are passed by the legislature tend to straightjacket the courts, taking away their discretion and possibly preventing the application of proper justice. Lastly, the complexity and length of undertaking a study that would set forth explicit rules for the triggering of the exclusion of evidence provides a disincentive for the legislature to get involved. While the legislature is better suited to further a broad and important social interest, legal matters with evidentiary implications aimed at truth are better left to the courts.

Finally, the Supreme Court has enumerated three purposes for using the Court's inherent supervisory powers: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity; and (3) as a remedy designed to deter illegal conduct.<sup>238</sup> When applied to prosecutors who violate the bribery statute, the use of the court's inherent powers to exclude testimony certainly preserves judicial integrity by removing possibly perjurious testimony. Exclusion also provides a disincentive for prosecutors to violate the bribery statute on future occasions. The policy of Congress through the bribery statute aims to protect courts and parties from the taint of bribery. Excluding tainted testimony removes the sole purpose of the unlawful conduct and leaves no incentive to violate the bribery statute. Exclusion of the illegally obtained testimony is particularly appropriate for this policy. In contrast, "to permit unlawfully obtained evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law."<sup>239</sup> While an argument can be made that testimony given in exchange for leniency should not be excluded since the courts have refused to exclude evidence in due process challenges, the proper perspective in leniency cases should focus not on the rights of the defendant, but on the conduct of the prosecutor and how the introduction of possibly perjurious testimony denigrates the judicial process.

In the end, there is an alternative to the exclusion of testimony when federal prosecutors violate the bribery statute. The Model Rules of Professional Conduct prohibit an attorney from offering inducements to a witness in contravention of the law.<sup>240</sup> If a court were to find that the bribery statute was violated but exclusion was improper based on notice and the availability of cross-examination, state ethics' rules should loom large, deterring federal prosecutors from offering leniency for testimony lest they be disciplined or even disbarred.

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238. See *United States v. Hasting*, 461 U.S. 499, 505 (1983).

239. *United States v. Mitchell*, 322 U.S. 65, 67 (1944) (quoting *McNabb v. United States*, 318 U.S. 332, 345 (1943)); see also *Fayemi v. Hambrecht*, 174 F.R.D. 319 (S.D.N.Y. 1997) (stating that "the court, by allowing the wrongdoer to utilize the information in litigation before it becomes complicit in the misconduct.").

240. See generally *supra* notes 205-09 and accompanying text.

In this way, the end result is the same; potentially perjurious testimony would not come to court, and the prosecutors would refrain from doing that which would land another person in jail.

#### IV. IS JUSTICE SERVED BY APPLYING THE BRIBERY STATUTE TO FEDERAL PROSECUTORS?

Prosecutors have wide discretion when choosing whether to prosecute certain cases. The courts must tread lightly whenever hampering the discretion of prosecutors, especially when the result may mean that an arguably guilty defendant will go free. However, the Supreme Court has spoken on this issue, saying "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."<sup>241</sup> In terms of the bribery statute, a prosecutor's discretion may not be in the best interests of justice. In other words, the prosecutor may be unwilling to prosecute another prosecutor for violations of the bribery statute, at least where the only violation deals with leniency granted in exchange for testimony.

The prosecutor has a duty not only to obtain a conviction, but also to seek justice.<sup>242</sup> This duty could conceivably give rise to the argument that prosecutors are well in control of their witnesses and know the difference between the truth and a lie. The government may, in fact, assume that prosecutors will not abuse their power and reward witnesses for perjured testimony.<sup>243</sup> However, justice is best served when all are held to the same law rather than relying on the prosecutor's judgment, especially when the incentive to lie is so great. Witnesses have, indeed, admitted to lying in their testimony in order to receive leniency. In *United States v. Kimble*,<sup>244</sup> the witness admitted to lying in over thirty different statements, after being motivated by his sense of self-preservation under a plea arrangement requiring his testimony in return for a lenient sentence.<sup>245</sup> Despite admissions of this sort, there is only one reported case where a testifying informant for the government was prosecuted for perjury.<sup>246</sup> It is well settled that the government cannot deliberately use perjured testimony or encourage the use of perjured testimony,<sup>247</sup> so the great incentive to lie in the face of an offer of leniency should cause the prosecutor to refrain from making such a deal lest he risk punishment for causing the perjury himself.

Federal prosecutors are representatives of "a sovereignty whose obligation

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241. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

242. *See Berger v. United States*, 295 U.S. 78, 88 (1935).

243. *See Johnston, supra* note 148, at 24.

244. 719 F.2d 1253 (5th Cir. 1983).

245. *See id.* at 1255-57.

246. *See Johnston, supra* note 148, at 22 (referring to *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991)).

247. *See Napue v. Illinois*, 360 U.S. 264, 269-70 (1959).



to govern impartially is as compelling as its obligation to govern at all."<sup>248</sup> Applying the bribery statute to all parties in a prosecution advances both the enforcement of laws and the proper administration of the judicial system.<sup>249</sup> Moreover, "[b]ecause prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of [the bribery statute] to their activities."<sup>250</sup>

Perhaps the most eloquent statement made in support of excluding evidence for prosecutorial malfeasance was made by Justice Brandeis in 1928. His often quoted dissent in *Olmstead v. United States*<sup>251</sup> states that:

Aid [to the government] is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination . . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.<sup>252</sup>

The *Singleton* panel expounded on Justice Brandeis's words by refusing to allow that "venerable principle" to give way to the expediency of the government's present practices without legislative authorization.<sup>253</sup> Clearly, the *Singleton* panel and others have found importance in the control of the possible abuse of prosecutorial discretion through their inherent supervisory powers.

### CONCLUSION

Justice is best served when it applies equally to the actions of prosecutors and defendants alike. In the case of testimony received in exchange for a recommendation of leniency, federal prosecutors are violating the bribery statute, 18 U.S.C. § 201(c)(2), and should be held accountable. First, the plain language of the bribery statute subjects everyone who creates a danger of corruption to punishment, prosecutor or not. Second, the sentencing guidelines and immunity authorization sections of the Code can independently coexist with the bribery statute, thereby showing no conflict. Third, offers of recommending leniency are, indeed, things of value, for the judge cannot depart from the sentencing

248. *Berger v. United States*, 295 U.S. 78, 88 (1935).

249. *See United States v. Singleton*, 144 F.3d 1343, 1346 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir.), *and cert. denied*, 527 U.S. 1024 (1999).

250. *Id.* at 1347.

251. 277 U.S. 438 (1928), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) *and Katz v. United States*, 389 U.S. 343 (1967).

252. *Id.* at 484-85 (Brandeis, J., dissenting).

253. *Singleton*, 144 F.3d at 1347; *see also Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 354 (1982) (requiring strict adherence to the language of the Sherman Act in order to enhance the legislative prerogative to amend the law).

guidelines or from statutory minimum sentences without a motion by the prosecutor. Moreover, the offer of leniency induces a witness to testify where he was not previously willing, which suggests that the offer has motivational value. Fourth, exclusion of testimony removes potentially perjurious influences out of court and deters such conduct in the future. In the alternative, a violation of the bribery statute will also be a violation of state ethics' rules, and because federal prosecutors are subject to state ethics' rules, they will be less likely to risk disciplinary action by granting leniency for testimony. Lastly, excluding testimony given in exchange for leniency comports with notions of justice and fair play. John Wachtel, attorney for Ms. Singleton, said that "[a]ny testimony that is paid for is untrustworthy."<sup>254</sup> Also, J. Richard Johnston, an early proponent of subjecting prosecutors to the bribery statute, said that "[i]f the basic policy reason behind the [law] is that paying a witness to testify is likely to induce the witness to slant testimony in favor of the side that pays him or her, that is a perversion of the judicial system, no matter which side does it."<sup>255</sup> The further the prosecutor is allowed to go in separating his allowable conduct from the public's, the closer we come to a police state, and we are diminished as a nation.

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254. Richey, *supra* note 2.

255. *Id.*



# LIVING IN SIN AND THE LAW: BENEFITS FOR UNMARRIED COUPLES DEPENDENT UPON SEXUAL ORIENTATION?

DEE ANN HABEGGER\*

## INTRODUCTION

The family, perhaps the most basic and central unit of civilized society, has traditionally been formed by the union of one man and one woman through marriage. As early as 1888, the United States Supreme Court held that marriage is "the most important relation in life" and that there would be neither civilization nor progress without the foundation of the family.<sup>1</sup> Marriage confers substantial rights. Couples who are part of a marital unit enjoy a plethora of benefits that are denied to unmarried individuals.<sup>2</sup>

However, the dramatic increase over the last several years in the number of unmarried couples, both heterosexual and homosexual, living together outside of marriage has led to an increasingly blurred definition of family.<sup>3</sup> One study,

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\* J.D., 1999, Indiana University School of Law—Indianapolis; B.A., 1993, Indiana University—Bloomington.

1. *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *see also Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (stating that "the right to marry is of fundamental importance."); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (stating that "marriage involves interests of basic importance in our society."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing marriage as "fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

2. These benefits include:

Inheritance and community property rights, recovery for loss of consortium and intentional infliction of emotional distress, sick and bereavement leave, coverage under a spouse's health and pension plans, tax breaks, veterans' and social security benefits, the right to live in a single family residential zone, spousal testimonial privileges, financial support upon separation, next-of-kin status to make medical decisions or burial arrangements, visitation privileges at hospitals and prisons, and entitlement to family rates at clubs and organizations.

David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J.L. & PUB. POL'Y 117, 117 (1993); *see also Legal Effects of Marriage*, (visited Oct. 12, 1998) <<http://www.nolo.com/ChunkSP/SP13.HTML>>. Marriage is the vehicle through which couples gain social acceptance, and the legal and economic benefits that marriage confers evidence the value that society places upon marriage and family. *See* Jennifer L. Heeb, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 352 (1993).

3. The number of unmarried couples living together has increased from 1.6 million in 1980 to 4.1 million in 1997. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1998, Table 66 (118th ed. 1998); *see also In re Ray Cummings*, 640 P.2d 1101, 1103 (Cal.

conducted by the Massachusetts Mutual Life Insurance Company, found that most Americans today define family in emotional terms such as "a group who love and care for each other" rather than in legal or structural terms.<sup>4</sup> This breakdown in the traditional concept of marriage has led to an increased legal recognition that unmarried couples can also constitute a family that is deserving of rights and benefits.<sup>5</sup>

This Note explores the legal treatment of heterosexual and homosexual cohabiting couples. Part I is a brief historical survey of society's treatment of cohabiting heterosexual couples. Part II compares society's treatment of cohabiting homosexual couples with its treatment of cohabiting heterosexual couples. Part III discusses the Reciprocal Beneficiaries Act, a first-of-its-kind statute enacted in Hawaii that confers substantial benefits to homosexual couples, but not to unmarried heterosexual couples. Part IV explores the legal and policy implications of affording disparate treatment to cohabiting heterosexual and homosexual couples. Finally, the Note concludes that as a policy matter, unmarried heterosexual couples should be included in any plan whose goal is to confer marriage-related benefits to unmarried couples.

## I. THE LAW AND COHABITING HETEROSEXUAL COUPLES

### A. *A Brief Historical Overview*

Due to the "fundamental importance" that American society has associated with marriage as the basis for family, couples who choose to cohabit without the benefit of marriage have historically been subjected to social and economic discrimination.<sup>6</sup> For example, unwed couples have been denied housing because of their "sinful" and "evil" relationship.<sup>7</sup> Mothers have had custody of their children taken away due to their nonmarital cohabitation and the alleged ill effect that such "utter disregard for moral guidance and social standards" has on a

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1982) (Bird, C.J., concurring) ("The definition of a 'family' in our society has undergone some change in recent years. It has come to mean something far broader than only those individuals who are united by formal marriage.").

4. Shoshana Bricklin, *Legislative Approaches to Support Family Diversity*, 7 TEMP. POL. & CIV. RTS. L. REV. 379, 379 (1998).

5. See Thomas S. Hixson, *Public and Private Recognition of the Families of Lesbians and Gay Men*, 5 AM. U. J. GENDER & L. 501, 502 (1997); see also *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989) (expanding the definition of "family" for the purpose of defining rights under rent stabilization laws to include a homosexual couple that had lived together for ten years); GRAHAM DOUTHWAITE, *UNMARRIED COUPLES AND THE LAW* 1 (1979) ("The courts are moving away from the often harsh traditional refusal to accord to unmarried couples and their offspring the status and rights which are accorded to lawfully married spouses and their children.").

6. See DOUTHWAITE, *supra* note 5, at 6.

7. See, e.g., *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. Ct. App. 1986). But see, e.g., *Swanner v. Anchorage Equal Rights Comm.*, 874 P.2d 274 (Alaska 1994).

child.<sup>8</sup> These couples have also been denied the numerous advantages associated with marital status such as intestate inheritance,<sup>9</sup> tax benefits, and community property rights.

Additionally, courts have traditionally viewed non-marital relationships with disfavor.<sup>10</sup> To illustrate, a concurring opinion of a 1957 Supreme Court of Washington case announced that "[o]bviously, . . . a [meretricious] relationship is not generally approved by the mores of our society. It is not a relationship which is encouraged by the courts."<sup>11</sup> Therefore, when disputes regarding property have arisen between parties to a non-marital cohabiting relationship, the courts have had to balance their duty to arbitrate disputes and to prevent unjust enrichment against their perceived responsibility to preserve the public morality by refusing to sanction the offensive relationship.<sup>12</sup> This balancing has sometimes led courts to pronounce that the parties to such a relationship should be left in the position in which they placed themselves, and that the court would not intervene in the dispute due to the inseparable connection between the immorality of the illicit relationship and the subject of the dispute.<sup>13</sup>

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8. *Brown v. Brown*, 237 S.E.2d 89, 91 (Va. 1977) (holding that mother was unfit to retain custody because she was openly cohabiting in the presence of her children).

9. *But see* N.H. REV. STAT. ANN. § 457:39 (1992) (providing that the surviving partner of a committed opposite sex relationship will be treated as a legal spouse for inheritance purposes if the couple had cohabited for a period of three years); OR. REV. STAT. § 112.0117 (Supp. 1998), *repealed by* 1999 Or. H.B. 2292 (effective Jan. 1, 2000) (providing that the surviving partner of a committed opposite sex relationship will be treated as a legal spouse for inheritance purposes if the couple had cohabited for a period of ten years).

10. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage . . . is an association that promotes a way of life . . .").

11. *West v. Knowles*, 311 P.2d 689, 692 (Wash. 1957) (Finley, J., concurring). A meretricious relationship is one in the nature of an "unlawful sexual connection." BLACK'S LAW DICTIONARY 988 (6th ed. 1990).

12. *See* IRVING J. SLOAN, *LIVING TOGETHER: UNMARRIEDS AND THE LAW*, at vi (1980); *see also* *Smith v. Smith*, 108 So.2d 761, 763 (Fla. 1959) (announcing that although the court was inclined to dismiss an action to establish an interest in property acquired during a nine-year non-marital relationship due to the immorality of the situation, the court would reluctantly allow the plaintiff the opportunity to submit evidence that a constructive trust was created).

13. *See, e.g., Houlton v. Prosser*, 194 P.2d 911 (Colo. 1948) (en banc); *Baxter v. Wilburn*, 190 A. 773 (Md. 1937); *Smith v. Smith*, 38 N.W.2d 12 (Wis. 1949). However, courts have always upheld express contracts so long as the contract was not made in contemplation of the illicit relationship. *See* *Emmerson v. Botkin*, 109 P. 531, 534 (Okla. 1910) ("[A]n express contract . . . is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are rendered, unless the contract was made in contemplation of such illicit relationship."); *Stewart v. Waterman*, 123 A. 524, 526 (Vt. 1924) ("Immoral or criminal as their conduct may be, there is no legal inhibition against their contracting with each other; and if their contract is not infected by the illegality of the relation, it is held to be enforceable."). Additionally, the parties will be protected if they can establish that they have a common law marriage. However, the majority of states do not recognize common law marriages. *See generally*



The harshness of this approach led the courts to develop equitable theories to provide recovery and to prevent unjust enrichment in property disputes involving meretricious relationships.<sup>14</sup> Accordingly, courts have applied theories of resulting trust,<sup>15</sup> constructive trust,<sup>16</sup> and equitable lien<sup>17</sup> to allow a party to an unmarried cohabiting relationship to obtain an interest in property even though the legal title was in the other party's name. Courts have also likened the non-marital cohabiting relationship to a business partnership or joint venture in order to give the complaining party an interest in the property acquired during the relationship.<sup>18</sup> However, the unpredictable application of these equitable doctrines places the unmarried cohabitant in an uncertain and precarious position when difficulty in the relationship develops.

### B. The Modern Trend

Over time, society has witnessed a dramatic increase in the number of couples choosing to live together outside of marriage and a corresponding relaxation in attitude towards these couples by the judiciary. This trend is best demonstrated by the 1976 landmark decision in *Marvin v. Marvin*.<sup>19</sup> The importance of the *Marvin* decision lies not necessarily in its holding, but in its

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Common Law Marriage (visited Oct. 12, 1998) <<http://www.nolo.com/ChunkSP/SP8.HTML>>.

14. Recovery that is allowed under a theory of unjust enrichment is not based upon an express or implied agreement between the parties; it is rooted in the principle that "one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

15. A resulting trust is an equitable theory designed to "effectuate the intent of the parties in certain situations where one party pays for property, or part of it, [and] for different reasons [it] is titled in the name of another." *Collins v. Davis*, 315 S.E.2d 759, 761 (N.C. Ct. App. 1984); see also *Williams v. Bullington*, 32 So. 2d 273 (Fla. 1947); *Walberg v. Mattson*, 232 P.2d 827 (Wash. 1951).

16. A constructive trust transforms the legal owner into a trustee and gives the complaining party equitable ownership of the property. See SLOAN, *supra* note 12, at 10; see also *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983); *Kuhlman v. Cargile*, 262 N.W.2d 454 (Neb. 1978); *Matos v. Gadman*, 570 N.Y.S.2d 68 (N.Y. App. Div. 1991).

17. In an equitable lien, the party with legal title retains the title and ownership of the property, and the lien acts to provide security for the outstanding debt. See SLOAN, *supra* note 12, at 10; see also *Marum v. Marum*, 194 N.Y.S.2d 327 (N.Y. Sup. Ct. 1959).

18. See, e.g., *Ferraro v. Ferraro*, 304 P.2d 168 (Cal. Ct. App. 1956); *Poole v. Schrichte*, 236 P.2d 1044 (Wash. 1951).

19. 557 P.2d 106 (Cal. 1976). In *Marvin*, Michelle Marvin alleged that she and Lee Marvin had entered into an oral agreement that they would share all property acquired during their seven-year non-marital relationship. See *id.* at 110. The California Supreme Court not only held that the agreement was enforceable, but went on to hold that courts could inquire into the conduct of the parties to determine the existence of any implied contract or implied agreement between the parties. See *id.* at 122.

forthright sanctioning of unmarried relationships.<sup>20</sup> The court in *Marvin* took cognizance of the obvious fact that more and more couples engage in nonmarital cohabitation and stated:

[T]he prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as time when our court should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship . . . . [T]he nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.

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The mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.<sup>21</sup>

Since the *Marvin* decision, society has continued its ever-increasing acceptance, or at least tolerance, of cohabitation as an alternative family life style. More and more courts today are willing to find implied agreements to share in the property acquired during the nonmarital cohabitation and to equitably divide such property rather than refusing cohabiting couples a remedy in the event that the relationship dissolves.<sup>22</sup> This change in attitude is further demonstrated by the willingness of some jurisdictions to extend the protection of their criminal laws specifically to unmarried cohabitants in domestic violence situations<sup>23</sup> and the fact that some courts have allowed a party to a cohabiting

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20. See DOUTHWAITE, *supra* note 5, at 180 (noting that “no court previous to *Marvin* ha[d] been so forthright in its sanctioning of unmarried relationships.”).

21. *Marvin*, 557 P.2d at 122. However, in an effort to provide assurances that the court was not advocating this alternative lifestyle, the court also stated: “[T]he structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.” *Id.*

22. See, e.g., *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Pinto v. Smalz*, 955 P.2d 770 (Or. Ct. App. 1998); *Wilbur v. DeLapp* 850 P.2d 1151 (Or. Ct. App. 1993); *Sutton v. Widner*, 933 P.2d 1069 (Wash. Ct. App. 1997). But see *Rehak v. Mathis*, 238 S.E.2d 81, 83 (Ga. 1977) (holding that cohabitation constituted immoral consideration and was incapable of supporting a contract); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) (holding that it was in violation of public policy to recognize mutual property rights between unmarried cohabitants).

23. See, e.g., CAL. PENAL CODE § 273.5 (West 1988 & Supp. 1999); KAN. STAT. ANN. § 21-3412(c)(4)(B) (Supp. 1997); N.H. REV. STAT. ANN. § 173-B:1 (1994); OHIO REV. CODE ANN. § 2317.02 (Anderson 1996 & Supp. 1997); R.I. GEN. LAWS § 12-29-1 (1994); S.C. CODE ANN. § 16-25-10 to -30 (Law. Co-op 1985); WASH. REV. CODE ANN. §§ 10.99.101, .020 (West 1990 & Supp.

relationship standing to bring a claim for negligent infliction of emotional distress upon witnessing injury to his or her partner.<sup>24</sup> Moreover, some municipalities allow unmarried couples to register their relationship as domestic partners, which may or may not carry with it any benefits,<sup>25</sup> and some employers extend benefits to the committed partners of their unmarried employees.<sup>26</sup>

This increasing acceptance is not uniform among jurisdictions nor have cohabiting couples achieved status that is comparable to their married counterparts.<sup>27</sup> The reality is that although the situation of unmarried cohabitants is much improved from years past, they nevertheless continue to be relegated to an inferior legal and social status, and they are generally treated as less deserving of rights and benefits than couples who choose to have the state sanction their relationship through marriage.<sup>28</sup>

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1999).

24. See *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994) (allowing a cohabitant bystander recovery, and holding that the "familial relationship" with the injured person necessary to permit a bystander to recover for his or her emotional distress upon witnessing injury is not limited to relationships of marriage or blood). But see *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) (en banc) (holding that unmarried cohabitant is not entitled to bystander recovery because such recovery would discourage marriage and encourage fraudulent claims).

25. See discussion *infra* Part III.B. Domestic partnerships are "business or political recognition of two adults seeking to share benefits normally conferred upon married couples." Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 163 (1995). It is "one step more than cohabitation, but one step less than marriage." *Id.* at 165. While domestic partnership ordinances vary, most require that the partners meet some version of the traditional definition of family by attesting that they are involved in a committed relationship of mutual caring and support and that they are unmarried. See Ron-Christopher Stamps, *Domestic Partnership Legislation: Recognizing Non-Traditional Families*, 19 S.U. L. REV. 441, 451 (1992). The first domestic partnership ordinance was passed in 1984 by Berkeley, California. See Richardson, *supra* note 2, at 121-22.

26. See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 337 (1998); see also *Employers with Domestic Partnership Policies* (visited Oct. 12, 1998) <<http://www.hrc.org/issues/workplac/dp/dplist.html>> (providing a list of employers who provide benefits to the domestic partners of their employees).

27. Some states continue to have laws that criminalize unmarried cohabitation. See, e.g., ARIZ. REV. STAT. ANN. § 13-1409 (West 1989); FLA. STAT. ANN. § 798.02 (West 1992); N.M. STAT. ANN. § 30-10-2 (Michie 1997 Repl.); N.C. GEN. STAT. § 14-184 (1993); N.D. CENT. CODE § 12.1-1-20-10 (1997).

28. Although the relationship of couples who cohabit may be similar in many ways to couples who are married, society has favored the institution of marriage over cohabitation for many reasons including (1) a desire to preserve the traditional view of family life, (2) to legitimize the children born of the union, and (3) religion sanctions and encourages marriage while declaring cohabitation sinful. See Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington's Community Property Statutes to Cohabitational Relationships*, 20 SEATTLE U. L. REV. 543, 554-55 (1997). Because unmarried cohabitation does not involve the highly

## II. THE LAW AND COHABITING HOMOSEXUAL COUPLES

### A. *The Condemnation of Homosexuality*

Although heterosexual couples who choose to live together outside of marriage have historically been looked down upon by society and subjected to social and economic discrimination, that discrimination has been mild compared to the discrimination that homosexual couples have faced. Virtually all cultures have condemned, or at least frowned upon, homosexuality.<sup>29</sup> The Bible, relied upon by the Judeo-Christian tradition, sets forth an absolute prohibition against homosexual activity: "Thou shalt not lie with mankind, as with womankind: it is abomination."<sup>30</sup> Therefore, it is not surprising that the "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."<sup>31</sup> This "state intervention" typically has taken the form of laws that make sodomy a criminal act.<sup>32</sup> The United States Supreme Court has declared such laws constitutional as recently as 1986 in *Bowers v. Hardwick*.<sup>33</sup>

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defined set of rights and obligations that marriage does, it is advisable for these couples to protect their interests by entering into a cohabitation agreement and constructing a proper estate plan. See Jared Laskin, *What You Should Know Before You Move in Together* (visited Oct. 7, 1998) <<http://www.plaimony.com/1.html>>.

29. See Jeffrey Hart, *Adam and Eve, Not Adam and Henry*, in SAME-SEX MARRIAGE 30, 31 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); see also *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) ("Proscriptions against that conduct has ancient roots."); Jeff Jordan, *Is It Wrong to Discriminate on the Basis of Homosexuality?*, in SAME-SEX MARRIAGE, *supra*, at 72, 77 ("The theistic tradition, Judaism and Christianity and Islam, has a clear and deeply entrenched position on homosexual acts: they are prohibited.").

30. *Leviticus* 18:22 (King James).

31. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

32. *Id.* at 192-93 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights . . . . In fact, until 1961, all 50 States outlawed sodomy. . . ."); see also Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 523 (1986) (discussing the historical basis of discrimination against homosexuals and noting that "[a]t common law, and at one time by statute in every state of the United States, sodomy was a criminal act.").

33. See *Bowers*, 478 U.S. at 194-96. The Court framed the issue as whether there was a fundamental right to engage in homosexual sodomy. See *id.* at 190. However, the statute in question did not differentiate between heterosexual and homosexual sodomy. See *id.* at 200 (Blackmun, J., dissenting). Several states continue to criminalize the act of sodomy. See, e.g., ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (West 1989); ARK. CODE ANN. § 5-14-122 (Michie 1997); FLA. STAT. ANN. § 800.02 (West 1992 & Supp. 1998); GA. CODE ANN. § 16-6-2 (1996 & Supp. 1998); IDAHO CODE § 18-6605 (1977); KAN. STAT. ANN. § 21-3505 (1995); LA. REV. STAT. ANN. § 14:89 (West 1996); MD. CODE ANN. art. 27, §§ 553-

In addition to having their private sexual conduct regulated by the State through criminal sanctions, homosexuals have been subject to wide spread discrimination in all contexts. In employment, homosexuals have been fired or refused employment merely because of their sexual orientation.<sup>34</sup> Homosexuals have also been denied custody of their children because of their alternative lifestyle.<sup>35</sup> Additionally, homosexuals are more often the victims of hate crimes than any other group.<sup>36</sup>

### *B. The Plight of the Homosexual Couple*

Homosexual couples who cohabit encounter many of the same legal obstacles that their unmarried heterosexual counterparts face. As all unmarried couples, homosexual couples are denied the rights and benefits that are attached to marriage such as property distribution, survivorship rights, health-related benefits and legal standing.<sup>37</sup> Moreover, the absence of any legal relationship

554 (1996); MASS. GEN. LAWS ANN. ch. 272, §§ 34-35 (West 1990); MICH. COMP. LAWS ANN. §§ 750.158, 750.338(a),(b) (West 1991 & Supp. 1998); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MO. REV. STAT. ANN. §§ 566.010, 566.090 (West 1979 & Supp. 1999); MONT. CODE ANN. §§ 45-2-101(20), -5-505 (1997); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1999); R.I. GEN. LAWS § 11-10-1 (1994 & Supp. 1998); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TEX. PENAL CODE ANN. § 21.06 (West 1994); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (Michie 1996).

34. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). In *Shahar*, the Attorney General of Georgia revoked an offer of employment to Robin Shahar to be a Staff Attorney upon learning of her lesbian "marriage." *Id.* at 1100-01. Reasons cited for the revocation included the appearance of conflicting interpretations of Georgia law that would affect the Department's credibility with the public, an interference with the Department's ability to enforce Georgia's sodomy law, and that the employment of Shahar would endanger the working relationships of the office lawyers. See *id.* All jurisdictions addressing this issue have held that Title VII does not protect employees from sexual orientation discrimination. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

35. See, e.g., *Newsome v. Newsome*, 256 S.E.2d 849, 855 (N.C. 1979) (transferring custody to father when court discovered that mother cohabitated with a woman); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (shifting custody to father when court discovered mother's open lesbian relationship); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (shifting custody to mother when court learned that father was living with his homosexual lover). But see *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (reversing lower court's order to change custody to father because mother was a lesbian); *Schuster v. Schuster*, 585 P.2d 130, 133 (Wash. 1978) (en banc) (refusing to change custody to father because of mother's homosexuality).

36. See *Rudy Serra, Sexual Orientation and Michigan Law*, 76 MICH. B.J. 948, 949 (1997); see also *Jantz v. Muci*, 759 F. Supp 1543, 1549 (D. Kan. 1991) (noting the widespread violence against homosexuals), *overruled by* 976 F.2d 623 (10th Cir. Kan. 1992).

37. See *Kristin Bullock, Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for*

between the parties places cohabiting homosexual couples in the same legal position as unmarried heterosexual couples; they must rely on contractual and equitable principles to protect their rights.<sup>38</sup>

The *Marvin* court's refusal to follow a standard that would render cohabitation contracts invalid if they involved unmarried sexual relationships was important not only for cohabiting heterosexual couples, but for homosexual couples as well. Although the *Marvin* decision concerned an agreement between a heterosexual couple, the court's language was neutral and did not limit its holding to heterosexual couples.<sup>39</sup> Therefore, courts subsequent to *Marvin* have increasingly, though certainly not uniformly, been willing to apply *Marvin* principles to homosexual cohabitation in the event that the relationship terminates.<sup>40</sup>

Although the degree of acceptance of homosexual cohabitation is not on par with that of cohabiting heterosexuals, society has increasingly tolerated homosexual cohabitation in the years since *Marvin*. For instance, some jurisdictions have allowed a former homosexual partner standing to seek

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*a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1035 (1992).

38. See MARVIN MITCHELSON, *LIVING TOGETHER* 115 (1980) ("In the eyes of the law, gay relationships fall into the same category as the meretricious spouse. They are beyond the boundaries of domestic relations and must take their cases into the civil court . . . as contract matters."); see also Jared Laskin, *Gay and Lesbian Issues* (visited Oct. 7, 1998) <<http://www.palimony.com/6.html>> ("There is no legal difference between unmarried cohabitation by straight couples and unmarried cohabitation by gay or lesbian couples.").

39. See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) ("[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."); see also Bullock, *supra* note 37, at 1044.

40. See *Bramlett v. Selman*, 597 S.W.2d 80, 85 (Ark. 1980) (holding that equity should not deny claimant from recovering property he purchased in his same-sex cohabitant's name); *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409-10 (Cal. Ct. App. 1988) (enforcing cohabitation agreement between homosexual couple); *Posik v. Layton*, 695 So.2d 759, 762 (Fla. Dist. Ct. App. 1997) (holding that an agreement for support between same-sex couples is valid if it is in writing and not inseparably based upon illicit consideration of sexual services); *Ireland v. Flanagan*, 627 P.2d 496, 500 (Or. Ct. App. 1981) (finding that an agreement between cohabiting lesbians to pool their earning indicated intent to be joint owners); *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. Ct. App. 1982) (holding that public policy considerations would not prevent a claimant from recovering on the basis of a partnership agreement with her same-sex cohabitant). But see *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Cal. Ct. App. 1981) (refusing to enforce cohabitation agreement between same-sex couple because sexual services were not a separable part of the agreement). See also Bullock, *supra* note 37, at 1045 (arguing that courts in California have been inconsistent in applying *Marvin* principles to homosexual couples due to homophobia); Laskin, *supra* note 38 (stating that the practical difference between unmarried heterosexual and homosexual couples is that it may be more difficult for a homosexual partner to enforce an oral or implied agreement due to bias against homosexuals).



visitation or custody.<sup>41</sup> Some jurisdictions have also allowed homosexual couples to adopt children.<sup>42</sup> Additionally, several cities have allowed homosexual couples to register their relationships as domestic partners.<sup>43</sup> Moreover, many employers that have extended benefits to the committed partners of their unmarried employees have expressly limited those benefits to homosexual partners.<sup>44</sup>

Although there are many similarities between unmarried heterosexual and homosexual cohabiting couples, there is one fact that makes the two relationships fundamentally different: heterosexuals always have the option of getting married while homosexual couples do not. Attempts by homosexuals to assert a constitutional right to marry have met with little success.<sup>45</sup> However, in 1993, Hawaii appeared as though it would be the first state to recognize same-sex marriages when it held in *Baehr v. Lewin*<sup>46</sup> that a law which restricts marriage to opposite-sex couples is a classification based on sex in violation of the Equal Protection Clause of the Hawaii Constitution.<sup>47</sup> In response to the perceived

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41. See *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996) (holding that former same-sex partner had standing to seek partial custody; partner stood in loco parentis to child as they were members of a nontraditional family). But see *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991) (refusing to grant partial custody of children to former lesbian partner); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (N.Y. App. Div. 1998) (holding that temporary visitation rights to former lesbian partner impermissibly impaired the biological mother's right to custody of her child conceived by artificial insemination when the women were a couple).

42. See *In re M.M.D. & B.H.M.*, 662 A.2d 837, 862 (D.C. 1995) (allowing homosexual to adopt his biological partner's child); *In re Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (allowing lesbian to adopt her partner's biological child); *In re Jacob*, 660 N.E.2d 397, 405-06 (N.Y. 1995) (allowing lesbian to adopt her partner's biological child); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1275-76 (Vt. 1993) (allowing lesbian to adopt her partner's biological child). But see FLA. STAT. ANN. § 63.042 (West 1997); N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994 & Supp. 1998) (prohibiting the adoption of minor children by homosexuals); *In re Adoption of T.K.J.*, 931 P.2d 488, 491 (Colo. Ct. App. 1996) (holding that homosexual couples are unable to adopt each other's children).

43. See O'Brien, *supra* note 25, at 181-82.

44. See *id.* at 178; see also *Employers with Domestic Partner Health Care Benefits for Same Gender Couples* (visited Oct. 12, 1998) <<http://www.nyu.edu/pages/sls/gaywork/codponly.html>> (providing a list of employers who provide health care benefits to same-sex partners).

45. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

46. 852 P.2d 44 (Haw. 1993).

47. See *id.* at 67. The court held that the government could deny same-sex couples the right to marry only if the law was justified by a compelling state interest and was narrowly tailored to avoid abridging constitutional rights (i.e., the law was subject to strict scrutiny). See *id.* Accordingly, the court remanded the case for a determination of whether compelling state interests

assault against traditional heterosexual marriage, Congress passed the In Defense of Marriage Act (DOMA) in 1996.<sup>48</sup> DOMA denies federal recognition to same-sex marriages by defining marriage as being between a man and a woman and provides for states to refuse to extend recognition to same-sex marriages performed in other states.<sup>49</sup>

### III. HAWAII AND THE RECIPROCAL BENEFICIARIES ACT

The citizens of Hawaii, like the rest of the nation, reacted strongly to the *Baehr* decision. One poll found that approximately seventy percent of Hawaii's registered voters opposed same sex marriage.<sup>50</sup> In an effort to prevent recognition of same-sex marriages, the Hawaiian legislature passed the Reciprocal Beneficiaries Act ("RBA") which became effective on July 1, 1997.<sup>51</sup> The passage of the RBA was a political compromise; it was attached to another bill which called for a constitutional amendment that would authorize the state legislature to restrict marriage to opposite-sex couples.<sup>52</sup>

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existed so as to justify the prohibition of marriage between couples of the same sex. *See id.* at 68. On remand, the circuit court ruled that the State had failed to provide sufficient evidence of a compelling state interest to justify the marriage law, and therefore, the law was unconstitutional. *See Baehr v. Miike*, No. 91-1394, 1996 WL 694235 at 21-22 (Haw. Cir. Ct. Dec. 3, 1996). However, implementation of the decision was suspended in order for the case to be reviewed by the Hawaii Supreme Court. *See id.*

48. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (Supp. IV 1998); 28 U.S.C. § 1738(C)).

49. *See* § 1738(C). The panic in the aftermath of the *Baehr* decision prompted at least twenty-five states to pass laws that specifically restrict marriage to opposite sex couples. *See Knauer, supra* note 26, at 335. For discussions regarding the constitutionality of this Act, see Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203 (1997); James M. Patten, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998); Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997); Melissa Rothstein, Essay, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997).

50. *See* Linda Hosek, *Reciprocal Benefits Reaction Lukewarm*, HONOLULU STAR-BULLETIN, July 17, 1997, available at <<http://starbulletin.com/97/07/17/news/index.html>>.

51. *See* Act Relating to Unmarried Couples (Reciprocal Beneficiaries), ch. 383, 1997 Haw. Sess. Laws 2C (codified at HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1998)).

52. *See* Linda Hosek, *A Peek Inside Hawaii's 'Pandora's Box'*, HONOLULU STAR-BULLETIN, July 3, 1997; Hosek, *supra* note 50; *see also* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 6-7 (1998). On November 3, 1998, 69% of Hawaiian voters approved the passage of the constitutional amendment. *See* Don Feder, *Nuptials for Gays Put to Test in Vt.*, BOSTON HERALD, Nov. 25, 1998, at O23, available in 1998 WL 7361941; Maggie Gallagher, *Hope in the Land of Aloha*, N.Y. POST, at 17, Nov. 14, 1998, available in 1998 WL 25290304.

*A. The RBA and Its Benefits*

The RBA permits same-sex couples to become "reciprocal beneficiaries" by filing a notarized declaration of their relationship with the Director of Health and paying an eight dollar fee.<sup>53</sup> Those couples who become reciprocal beneficiaries are entitled to substantial benefits that were previously available only through marriage.<sup>54</sup> Some of the benefits include:

Survivorship rights including inheritance, workers compensation survivorship benefits, state employees retirement beneficiary benefits;

Health related benefits including hospital visitation, private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave;

Benefits and obligations relating to jointly held property: tenancy in the entirety, disaster relief loans, and public land leases;

Legal standing relating to wrongful death, victims rights, and domestic violence family status; and

Miscellaneous benefits such as University of Hawaii facilities use, anatomical gifts, and government vehicle emergency use.<sup>55</sup>

However, many of the most fundamental rights and obligations associated with marriage, such as provisions for financial support, distribution of property, and determination of child custody upon termination of the relationship, were denied to reciprocal beneficiaries.<sup>56</sup> Obligations for spousal debts, as well as civil and criminal testimonial privileges, were also denied.<sup>57</sup>

Additionally, no federal marriage-related benefits could be bestowed upon reciprocal beneficiaries due to federal preemption and the enactment of DOMA with its restrictive language limiting marriage to a union between a man and a woman. To illustrate, the RBA, as written, required public, as well as private, employers to provide a variety of benefits, such as health insurance, to reciprocal

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53. HAW. REV. STAT. ANN. §§ 572C-3 to -5 (Michie 1999).

54. *See id.* §§ 572C-1, -2, -6.

55. CONF. COMM. REP. NO. 2, H.B. NO. 118, at 2 (Haw. 1997).

56. *See* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 FORDHAM L. REV. 1699, 1742 (1998); *see also* *Frequently Asked Questions* (visited Oct. 9, 1998) <<http://www.hawaii.gov/health/rbrfaq.htm>>; Hosek, *supra* note 52 (noting that the RBA extends only about 45 of some 400 benefits offered through marriage).

57. *See* Christensen, *supra* note 56, at 1742 n.270.

beneficiaries.<sup>58</sup> In an unreported decision, a federal district court held that the federal Employee Retirement Income Security Act ("ERISA") preempted application of state law to private sector benefit plans covered by ERISA.<sup>59</sup> Therefore, private employers are not required to offer benefits to reciprocal beneficiaries. Additionally, reciprocal beneficiaries do not qualify as spouses for tax purposes.<sup>60</sup> As a result, public sector employees who are able to receive benefits for their reciprocal beneficiary have to include the fair market value of the benefits provided for their reciprocal beneficiary in their gross income.<sup>61</sup> As a result, the RBA's omission of many of the major benefits and burdens of marriage has the effect of creating a type of second-class marriage.

Though a far cry from the benefits associated with marriage, the importance of this groundbreaking legislation should not be overlooked: the RBA is the first state law that confers status as well as considerable rights and benefits to unmarried couples.<sup>62</sup>

### *B. The RBA and Municipal Domestic Partnership Registries: A Comparison*

In the mid-1980s, many municipalities began establishing domestic partner registries that enable unmarried couples to declare themselves partners in a committed relationship with marriage-like characteristics and thereby obtain some form of legal recognition.<sup>63</sup> Domestic partnership ordinances vary considerably from city to city.<sup>64</sup> The benefits extended are fairly limited and can range from little more than recognition of the relationship to hospital visitation privileges to the extension of health benefits to city employees.<sup>65</sup> Generally, the status of domestic partner is attained through the filing of a declaration by a couple stating that they are unmarried and are each other's sole domestic partner, that they are responsible for each other's welfare, and that they live together in

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58. See *id.* at 1740; see also Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267, 271 (1998).

59. See Fisk, *supra* note 58, at 271 n.13; see also Linda Hosek, *Reciprocal Benefits Limited*, HONOLULU STAR-BULLETIN, Sept. 26, 1997.

60. See Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996).

61. See *id.*; see also Knauer, *supra* note 26, at 342-43 nn.29-30.

62. See HAW. REV. STAT. ANN. §§ 572C-1, -2, -4, -6 (Michie 1999); see also Christensen, *supra* note 56, at 1739; Hosek, *supra* note 52.

63. See Stamps, *supra* note 25, at 451. Domestic partnership laws have been enacted in cities such as Ann Arbor, Michigan; Atlanta, Georgia; Cambridge, Massachusetts; Chicago, Illinois; Los Angeles, California; Madison, Wisconsin; Minneapolis, Minnesota; New York, New York; San Francisco, California; Seattle, Washington; and Takoma Park, Maryland just to name a few. See Christensen, *supra* note 56, at 1734-35; Richardson, *supra* note 2, at 121-22.

64. See Richardson, *supra* note 2, at 122.

65. See *id.*; O'Brien, *supra* note 25, at 166. The scope of benefits extended by municipal domestic partnership registries are necessarily restricted due to state and federal preemption. See Christensen, *supra* note 56, at 1738-39; Richardson, *supra* note 2, at 122.

a cohabitation arrangement.<sup>66</sup> Additionally, the partners must not be related by blood so that the relationship can be distinguished from other types of familial relationships.<sup>67</sup>

At first blush, the RBA appears to be merely a statewide version of the municipal domestic partnership registries with a corresponding conferral of a greater number of benefits. However, the status of reciprocal beneficiary and domestic partner are really quite different. To be eligible to enter into a reciprocal relationship, the parties must be at least eighteen years old, unmarried, not in another reciprocal relationship, and not under the influence of force, duress, or fraud.<sup>68</sup>

What distinguishes reciprocal beneficiaries from domestic partners is that the RBA requires that the parties be *legally prohibited from marrying one another* in order to be eligible to enter into a reciprocal relationship.<sup>69</sup> The import of this requirement is that not only are same-sex couples eligible to register as reciprocal beneficiaries, but so are people related by consanguinity.<sup>70</sup> Moreover, heterosexual couples are excluded from the list of potential beneficiaries since they are not legally prohibited from marrying.<sup>71</sup> Such a provision is unique and clearly delineates reciprocal beneficiaries from domestic partners, the latter of who may never be related by blood and are most often open to both homosexual or heterosexual couples.<sup>72</sup> Additionally, in contrast to domestic partner registries, the RBA does not require that the couple be involved in an emotional or intimate relationship.<sup>73</sup>

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66. See Stamps, *supra* note 25, at 452.

67. See *id.*

68. See HAW. REV. STAT. ANN. § 572C-4 (Michie 1999).

69. See § 572C-4(3). The legislature paid lip service to the ability of homosexuals to engage in meaningful relationships:

[T]he legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

HAW. REV. STAT. ANN. § 572C-2.

70. "The inclusion of couples who are related to each other biologically or through adoption undermines the recognition of same-sex committed relationships as uniquely intimate, emotional attachments and therefore supports . . . subordination based on sexual orientation." Fellows et al., *supra* note 52, at 30; see also David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 489-91 (1996) (advocating the extension of marital benefits to relationships of consanguinity).

71. See HAW. REV. STAT. ANN. §§ 572C-1, -2, -4.

72. See Richardson, *supra* note 2, at 122; Stamps, *supra* note 25, at 452.

73. See generally HAW. REV. STAT. ANN. §§ 572C-1 through -6. The RBA also does not

#### IV. HETEROSEXUALS: SHOULD THEY BE INCLUDED?

The ever-increasing number of municipalities that are willing to extend benefits, albeit limited, to unmarried couples indicates a legal recognition of the validity of alternative relationships, i.e., those that are not established through a marital tie.<sup>74</sup> This recognition is also visible at the state level, although no state other than Hawaii has enacted legislation that confers significant benefits to unmarried couples.<sup>75</sup> However, as the number of "traditional" households decline, and as homosexuals continue to demand recognition and equality, more states may be inclined to bestow rights and benefits to alternative families.<sup>76</sup> What model should these states follow? Should they follow Hawaii's approach and exclude heterosexuals from the list of potential beneficiaries? Or, should they fashion their legislation in keeping with the majority of municipal domestic partnership registries and make the benefits available to all unmarried couples, whether homosexual or heterosexual?

##### A. *The Debate About Heterosexuals in Other Contexts*

In drafting and implementing legislation to grant rights and benefits to unmarried couples, states may find it helpful to consider similar debates surrounding the inclusion or exclusion of heterosexual couples that have taken place in the context of domestic partnership registries and employer-provided benefits to domestic partners.<sup>77</sup>

1. *Actions at the Federal Level.*—Employers who provide benefits to the unmarried partners of their employees must initially decide whether to limit the benefits to homosexual couples or whether to offer them to all unmarried couples. Generally speaking, public employers tend to grant benefits to *all* unmarried couples while private employers are more likely to grant benefits only to the same-sex partners of their employees.<sup>78</sup>

Those employers who have limited benefits to same-sex couples have not faced any significant legal challenges to their decisions until recently.<sup>79</sup> In May 1998, Paul Foray filed a lawsuit in a New York federal court alleging that Bell Atlantic's policy of extending benefits to domestic partners of the same-sex, but

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require that the couple be residents of Hawaii or that they maintain a common residence. See Jacob Kamhis, *Reciprocal Benefits Open Pandora's Box*, PAC. BUS. NEWS, June 2, 1997, available at <<http://www.bizjournals.com/pacific/stories/1997/06/02/story3.html>>.

74. See discussion *supra* Part III.B; see also *supra* note 63 and accompanying text.

75. See *supra* note 62.

76. See *supra* note 3 and accompanying text.

77. See generally Bricklin, *supra* note 4; Jonathan Rauch, *What's Wrong with "Marriage Lite,"* WALL ST. J., June 2, 1998, at A22; David E. Rovella, *Same Benefits for Hetero, Gay Couples?*, NAT'L L.J., June 1, 1998, at B1.

78. See Hixson, *supra* note 5, at 502-03.

79. See Bruce J. Kasten et al., *Domestic-Partner Benefits Plans Raise Legal Issues*, NAT'L L.J., June 8, 1998, at B7.



not of the opposite sex, is discrimination based on sex in violation of Title VII of the Civil Rights Act.<sup>80</sup> The complaint is problematic, however, because the company focused on the partnership, not the gender, of the employees in denying benefits.<sup>81</sup> Because Title VII does not protect against sexual orientation or marital status discrimination, Mr. Foray's suit is unlikely to succeed.<sup>82</sup>

Similarly, any challenges to a statewide RBA-type legislation on the grounds that excluding heterosexual couples is discriminatory under Title VII will not succeed. Moreover, a challenge alleging a denial of equal protection of the laws also will not meet with much success.<sup>83</sup> A court, when hearing such a claim, would inquire whether there exists a rational basis for the discrimination.<sup>84</sup> In such a situation, the court would defer to the wisdom of the state legislature in enacting the statute, and the legislation would most likely be upheld.<sup>85</sup>

Arguably, a heterosexual couple challenging such legislation could succeed on a claim alleging a denial of due process.<sup>86</sup> Because marriage has been held to be a fundamental right, the freedom of choice to marry, or not to marry, is constitutionally protected.<sup>87</sup> Therefore, forcing heterosexual couples to get married in order to attain benefits that are available to other unmarried couples could possibly be found to be unconstitutional.

*2. Actions at the State Level.*—Although federal law does not protect against discrimination based on sexual orientation or marital status, some states have enacted laws that forbid these kinds of discrimination. State and local prohibitions against marital status<sup>88</sup> and sexual orientation<sup>89</sup> discrimination are

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80. See *id.*; Rovella, *supra* note 77. The complaint states that “[g]iven the fact that his domestic partner is female, . . . Foray was denied benefits because he is male.” Rauch, *supra* note 77. See generally Civil Rights Act of 1964, § 701 as amended, 42 U.S.C. § 1985 (1994).

81. See Rovella, *supra* note 77.

82. All jurisdictions addressing this issue have held that Title VII does not protect employees from sexual orientation discrimination. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). “What the company is doing may be something people don’t approve of as a social matter, but it isn’t violative of any federal discrimination laws.” Daniel Hays, *Domestic Partner Benefits Spark Sex Suit*, NAT’L UNDERWRITER LIFE & HEALTH-FIN. SERVICES EDITION, June 8, 1998, at 37.

83. See U.S. CONST. amend. XIV, § 1. “[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

84. See *Loving*, 388 U.S. at 9.

85. See *id.*

86. See U.S. CONST. amend. XIV, § 1. A statutory classification that significantly interferes with the exercise of a fundamental right will be found invalid unless it is supported by a compelling state interest and the classification is necessary to further that state interest. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

87. See *Bricklin*, *supra* note 4, at 392.

88. See, e.g., ALASKA STAT. §§ 18.80.200, 210 (Michie 1998); CAL. GOV’T CODE §§ 12940,

designed primarily to ensure that an individual's status as a married, single, heterosexual, or homosexual person is not the basis for providing employee benefits or making other employment decisions.

Lawsuits filed by homosexual couples asserting that the failure to offer them employee benefits that are available to heterosexual married couples is unlawful discrimination based on sexual orientation have not met with much success.<sup>90</sup> However, the rationale for such decisions is based, to a large extent, on the fact that unmarried heterosexuals are also excluded from the benefit plans. To illustrate, the court in *Ross v. Denver Department of Health and Hospitals* held that the denial of sick leave benefits to a municipal employee to care for her same-sex domestic partner did not violate a rule prohibiting discrimination on the basis of sexual orientation.<sup>91</sup> In so holding, the court stated "[a]n unmarried heterosexual employee also would not be permitted to take family sick leave benefits to care for his or her unmarried opposite-sex partner. Thus, the rule does not treat homosexual employees and similarly situated heterosexual employees differently."<sup>92</sup>

Therefore, legislation comparable to the RBA, which excludes heterosexuals from reaping the benefits bestowed upon other unmarried couples, could possibly be found unlawful in those states that have laws prohibiting sexual orientation discrimination since an unmarried opposite-sex couple is not treated the same as an unmarried same-sex couple.<sup>93</sup>

19702, 12920, 12921 (West 1992 & Supp. 1999); CONN. GEN. STAT. ANN. § 46a-60 (West 1995 & Supp. 1999); DEL. CODE ANN. tit. 19, § 711 (1995 & Supp. 1998); D.C. CODE ANN. §§ 1-2501, -2512 (1999); FLA. STAT. ANN. § 760.10 (West 1997 & Supp. 2000); HAW. REV. STAT. ANN. § 378-2 (Michie 1999); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 1993 & Supp. 1999); MD. ANN. CODE art. 49B, §§ 14, 16 (1998 & Supp. 1999); MICH. COMP. LAWS ANN. §§ 37.2102, 37.2202(1) (West 1985 & Supp. 1999); MINN. STAT. ANN. §§ 363.03, .12 (West 1991 & Supp. 2000); MONT. CODE ANN. § 49-2-303 (1999); NEB. REV. STAT. § 81-1355 (1994); N.H. REV. STAT. ANN. §§ 354-A: 1, :6-8 (1995 & Supp. 1999); N.J. STAT. ANN. §§ 10:5-4, -12 (West 1993 & Supp. 1999); OR. REV. STAT. § 659.020 (1989 & Supp. 1998); VA. CODE ANN. § 2.1-715 (Michie 1995 & Supp. 1999); WASH. REV. CODE ANN. § 49.60.010 (West 1990 & Supp. 2000); WIS. STAT. ANN. §§ 111.31, .321 (West 1997 & Supp. 1999).

89. See, e.g., CAL. LAB. CODE § 1102.1 (West Supp. 1999), *repealed by* 1999 Cal. Stat. 592; CAL. GOV'T CODE §§ 12921, 12940 (West 1999); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); D.C. CODE ANN. §§ 1-2501, -2512 (1999); HAW. REV. STAT. § 378-2 (Michie 1999); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1996 & Supp. 1999); MINN. STAT. §§ 363.01, .12 (Supp. 1998); N.J. STAT. ANN. §§ 10:5-4, 10:5-12 (West 1993 & Supp. 1999); R.I. GEN. LAWS §§ 28-5-3, -7 (1995 & Supp. 1998); VT. STAT. ANN. tit. 21, § 495(a) (Supp. 1999); WIS. STAT. ANN. §§ 111.31, .36 (West 1997 & Supp. 1999).

90. See, e.g., *Ross v. Denver Dep't of Health & Hosp.*, 883 P.2d 516 (Colo. Ct. App. 1994); *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); *Philips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992).

91. See *Ross*, 883 P.2d at 520.

92. *Id.*

93. See *Fisk*, *supra* note 58, at 276 (stating that limiting domestic partner benefits to

Similar lawsuits, alleging discrimination based on marital status, have also failed.<sup>94</sup> That is until the Alaska Supreme Court held in *University of Alaska v. Tumeo* that the university's denial of health insurance benefits for the same-sex committed partners of their employees, while offering those same benefits to employees who were legally married, was marital status discrimination in violation of the Alaska Human Rights Act.<sup>95</sup> Interestingly, the plaintiffs argued that the university's policy of extending partner benefits only to employees with a legal spouse was discriminatory towards all unmarried couples, not just the homosexual ones.<sup>96</sup> Nonetheless, the court limited its decision to same-sex couples because none of the plaintiffs were unmarried opposite-sex couples.<sup>97</sup>

Arguably, RBA-type legislation that excludes heterosexual couples is discrimination based on marital status in those jurisdictions that have laws proscribing such conduct. Marriage is a state-conferred legal status which gives rise to rights and benefits which are reserved exclusively for that relationship.<sup>98</sup> Reciprocal beneficiaries, or whatever name a state legislature chooses to assign to the relationship, is also a state-conferred legal status and requiring heterosexuals to marry in order to receive any type of benefits could possibly be construed to be a form of marital status discrimination.

### *B. Arguments in Favor of Excluding Heterosexuals*

Whether excluding heterosexual couples from the list of potential beneficiaries of a plan to grant benefits to unmarried couples is legal or not, is such exclusion in keeping with policies that society should promote? No social change is brought about without controversy, and many have strong sentiments about this issue. The following are rationales given in support of the notion that unmarried, opposite-sex couples should never be given benefits that mirror those that traditionally could only be attained through marriage.

1. *Heterosexuals Can Always Get Married.*—The most pervasive and obvious rationale for excluding opposite-sex couples from any type of program

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homosexual couples could possibly constitute illegal discrimination in those states that forbid discrimination based on sexual orientation, but argued that the more compelling view is that there is no unlawful discrimination because heterosexual and homosexual couples are not similarly situated because heterosexual couples can obtain benefits by getting married). The RBA does not necessarily discriminate based on sexual orientation because it allows anyone who is legally prohibited from marrying, which may include heterosexuals related by consanguinity, to register as reciprocal beneficiaries. See HAW. REV. STAT. ANN. § 572C-4(3). However, the focus of this note is on the implications of state-wide legislation that excludes heterosexual couples and not on the RBA specifically.

94. See, e.g., *Funderburke v. Uniondale Union Free Sch. Dist.* No. 15, 660 N.Y.S.2d 659 (N.Y. Sup. Ct. 1997), *aff'd*, 676 N.Y.S.2d 199 (N.Y. App. Div. 1998).

95. 933 P.2d 1147 (Alaska 1997).

96. See *id.* at 1149 n.2.

97. See *id.*

98. See *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993).

that grants benefits to unmarried couples is that heterosexuals have the option of getting married, unlike their homosexual counterparts.<sup>99</sup> The two are not similarly situated, and accordingly, it is unnecessary, from a fairness perspective, to include unmarried heterosexual couples.<sup>100</sup> If opposite-sex couples desire the benefits that marriage provides, so the argument goes, then they should simply get married.<sup>101</sup>

In response to claims that there are legitimate reasons for couples not to wed and denying benefits in the face of these valid reasons is unfair and discriminatory, supporters of this theory contend that any financial reason that may exist to discourage a couple from getting married can be worked out legally through contract.<sup>102</sup> Moreover, cohabiting couples are far less likely to remain together over the long run than married couples, and studies have shown that as a group, unmarried couples are less happy, healthy, and wealthy than their married counterparts.<sup>103</sup> Therefore, "it is very hard to make an argument for including heterosexuals . . . All they have to do is get married."<sup>104</sup>

2. *Including Heterosexuals Would Discourage Marriage.*—The traditional concept of family has historically been based upon marriage.<sup>105</sup> Marriage is the basic building block of Western Civilization and is said to be the foundation of

99. See O'Brien, *supra* note 25, at 178; Knauer, *supra* note 26, at 346.

100. Chicago, for instance, opted not to include opposite-sex partners in a plan to extend health benefits to the same-sex partners of the city's employees. The decision was based on "equity" because "[g]ays and lesbians are prohibited from marrying by state law . . . [h]eterosexuals aren't." *Updates: Chicago OK's Partner Benefits*, BUS. INS., Mar. 24, 1997, at 26.

101. Although the Human Rights Campaign, the nation's largest gay-rights group, has not formally taken a position on benefits for unmarried heterosexuals, Kim Mills, the education director of the group, stated that a law tailored to providing only same-sex benefits is defensible "[b]ecause gay couples can't legally marry . . . they have no other way to secure benefits for their partners—unlike heterosexual couples, who can walk to the altar if they want benefits." Shawn Zeller, *All in the So-Called Family*, NAT'L J., Sept. 19, 1998, available in 1998 WL 2089599; see also *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828, 834 (N.J. Super. Ct. App. Div. 1997) (stating that an "elementary response" for heterosexual domestic partners is that marriage solves the problem).

102. See Zeller, *supra* note 101.

103. See *id.*

104. *Id.*

105. See *Maynard v. Hill*, 125 U.S. 190, 205 (1888); see also *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (stating that "the right to marry is of fundamental importance."); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (stating that "marriage involves interests of basic importance in our society."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing marriage as "fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

a strong, stable, and healthy society.<sup>106</sup> Thus, public policy mandates that laws promote, not discourage marriage.

Conservative, pro-family critics urge that bestowing benefits upon unmarried heterosexual couples would weaken and slowly destroy the institution of marriage.<sup>107</sup> According to this theory, when a benefit is detached from marriage and given to all unmarried couples, the significance of marriage is weakened for everyone and the institution gradually takes on a symbolic status as opposed to being a truly meaningful institution.<sup>108</sup> Moreover, the rising number of heterosexual couples who choose to cohabit without the benefit of marriage demonstrates an eroding respect for marriage, and giving marriage-like benefits to these couples would further diminish incentives to get married.<sup>109</sup>

### *C. Arguments in Favor of Including Heterosexuals*

On the other side of the debate are those who believe that any benefits that are to be bestowed upon unmarried couples should be given without regard to the sexual orientation of the couple. Listed below are justifications that are advanced in support of this position.

1. *All Non-Traditional Families, Whether Homosexual or Heterosexual, Deserve the Same Recognition and Support.*—A traditional family consists of a husband and wife with their children. Today, however, fewer and fewer American households contain traditional families. A 1997 survey revealed that only twenty-five percent of this nation's households fit the traditional definition of family and that the number of unmarried couples living together has increased by 2.5 million since 1980.<sup>110</sup> These changing social patterns are incompatible with the notion that the term "family" should be restricted to the traditional definition.

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106. See Richardson, *supra* note 2, at 118.

107. See Zeller, *supra* note 101. This reasoning was embraced by Massachusetts Governor A. Paul Cellucci when he vetoed domestic partner legislation that extended benefits to unmarried couples, regardless of sexual orientation. Governor Cellucci stated that "[e]xtending health care benefits to unmarried [heterosexual] couples undermines strong marriages and leads to our children growing up without fathers. . . . [w]e must do everything we can to support marriages and discourage out-of-wedlock births." Kelly M. Fitzsimmons, *Domestic Partners Legislation Vetoed*, MASS. L. WKLY., Aug. 17, 1998, at 27.3 A study conducted by the Urban Institute indicates that 57% of unwed fathers visit their child at least weekly during the first two years of life. That number drops to only 25% by the time the child is seven-and-a-half-years old. See Zeller, *supra* note 101.

108. See Hixson, *supra* note 5, at 521.

109. See Zeller, *supra* note 101. In support of the contention that cohabitation should be discouraged, advocates point to research which "suggests that cohabiting women are more than twice as likely as married women to be victims of domestic violence, and more than three times as likely to suffer depression; cohabiting partners tend to be less sexually faithful . . . 'Partnership' is less durable than marriage. . . ." Rauch, *supra* note 77.

110. See U.S. DEP'T OF COMMERCE, *supra* note 3, at Tables 77, 83; see also *supra* text accompanying note 3.

These alternative families may consist of an unmarried couple, either heterosexual or homosexual, with or without minor children.<sup>111</sup> Such relationships entail extensive sharing of responsibilities and embody many of the values and functions of a traditional family such as stability, commitment, support, care, and affection. Arguably, these cohabiting relationships meet many of the acknowledged values promoted by marriage at least as well as the marital relationship itself given the lack of commitment to traditional family values indicated by this country's high divorce rate.<sup>112</sup>

This diversity in family relationships, whether welcome or not, is a reality in today's society. Accordingly, cohabiting heterosexual couples should be granted benefits under statutory "pseudo-marriage" schemes to the same extent that homosexual couples are, in order to recognize and support family units, whatever their makeup.<sup>113</sup> Such an approach recognizes that changes in American society have created diverse family relationships and that support for these families is important to continued well-being of society and its members, both adult and child. Moreover, its focus is not to offer a gay marriage equivalent, but to truly support many diverse family types.

2. *All Couples Have a Fundamental Right Not to Get Married.*—In response to the argument that cohabiting opposite-sex couples can obtain the benefits they desire simply by getting married, supporters of including heterosexuals in any plan to confer benefits to unmarried couples contend that all people have the freedom to choose whether they want to marry or not, and the grant of benefits should not hinge upon this decision.<sup>114</sup> Advocates of this theory stress that "[f]reedom of choice is not a one-way street where the only decision deserving protection is one that is socially preferred by those in power."<sup>115</sup>

Cohabitation, overall, has become firmly established as a feasible and workable alternative to traditional marriage.<sup>116</sup> Although many view opposite-sex

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111. See, e.g., David C. Wiegel, *Proposal for Domestic Partnership in the City of Detroit: Challenges Under Law*, 74 U. DET. MERCY L. REV. 825, 825 (1997). The effect these alternative families have on children should not be underestimated. Three out of ten cohabiting households couples contain children. See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1865-66 (1987).

112. See Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 98 (1991). Some commentators have questioned whether it is appropriate to utilize marriage and family as the criteria for conferring benefits and achieving social acceptability. See *id.* at 120-22.

113. Thomas F. Coleman, *Domestic Partners Plan: 1 Step Forward, 2 Back*, CHI. DAILY L. BULL., March 17, 1997, at 5.

114. See Bricklin, *supra* note 4, at 392.

115. Coleman, *supra* note 113.

116. See, e.g., Kris Franklin, "A Family Like Any Other Family": *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1045 (1990-91); see also Zeller, *supra* note 101 ("Cohabitation is becoming a lifetime decision for lots of people, and more and more are choosing to co-habit before getting married." (quoting Dorian Solot, co-founder of the Alternatives to Marriage Project which is based in Massachusetts)).



couples who live together, choosing to cohabit rather than marry, as casual and less committed in their relationships and thus undeserving of any of the rights and benefits that are associated with marriage, legitimate reasons do exist for not marrying. Some people object to the religious implications that are invariably linked to marriage or believe that traditional marriage promotes oppressive gender roles that are not egalitarian.<sup>117</sup> Elderly people may risk losing Social Security benefits and survivors' pensions.<sup>118</sup> Moreover, the added costs of marriage and the money, time, and emotional upheaval attendant to divorce proceedings are enough to dissuade many from saying, "I do."<sup>119</sup> Whatever the reason for not desiring marriage, supporters of this theory propound, a heterosexual couple that chooses not to wed should not be penalized for this decision: a "get married or get lost" attitude is intolerable.<sup>120</sup>

3. *Gay Rights Perspective: The Exclusion of Heterosexual Couples Results in Homosexuals Being Forever Relegated to the Inferior Status Provided by a "Pseudo-Marriage" Scheme.*—As previously mentioned, public employers, when they decide to implement domestic partnership benefit plans, are more likely to make benefits available to all unmarried couples, both heterosexual and homosexual.<sup>121</sup> This phenomenon is the product of a long tradition of homosexual couples attaining legal recognition and support only through membership in the larger class of unmarried couples generally.<sup>122</sup> Underlying this practice is a politically motivated fear of the ramifications that endorsing gay marriage would entail.<sup>123</sup> By allowing homosexual couples only the same entitlements that are granted to unmarried heterosexual couples, same-sex relationships are not really legitimized.<sup>124</sup>

Supporters of this theory contend that the only way for homosexuals to achieve true equality is to be granted the right to marry; only then will they have

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117. See Stamps, *supra* note 25, at 459; Treuthart, *supra* note 112, at 122. Until relatively recently, the husband controlled all of the marital assets and made all decisions, leaving the woman with no voice. This subordination of women is not obsolete; social and institutional structures within our society reinforce this subordination. For example, women are generally poorer after a divorce than are men. See Chambers, *supra* note 70, at 453-54.

118. See Zeller, *supra* note 101.

119. See Stamps, *supra* note 25, at 459; Rovella *supra* note 77. The so-called "marriage penalty" is another reason that couples may choose not to marry: by living together without marriage, each can file a separate income tax return and maximize their incomes. Chambers, *supra* note 70, at 473.

120. See, e.g., Coleman, *supra* note 113.

121. See *supra* note 78 and accompanying text.

122. See Hixson, *supra* note 5, at 521 (analyzing the public and private approaches to recognizing homosexual families and stating that "[a] lawsuit seeking legal recognition of a same-sex couple as family . . . has a good chance of success only if an unmarried heterosexual couple could file an exactly identical suit."); see also discussion *supra* Part II.B.

123. See Hixson, *supra* note 5, at 519.

124. See *id.*

the same rights heterosexual couples do.<sup>125</sup> While the RBA, along with any other plan designed to grant benefits to unmarried couples, may grant numerous benefits to reciprocal beneficiaries, a great number of the most fundamental and significant benefits attached to marriage are withheld.<sup>126</sup> The net effect of this is a creation of a type of second-class marriage, it is not marriage or a comparable equivalent. Consequently, same-sex couples will forever be relegated to an inferior status, perpetually denied the legal recognition that married opposite-sex couples enjoy.<sup>127</sup>

### CONCLUSION

The notion of allowing couples who are "living in sin" to reap the benefits traditionally associated with marriage, and thereby putting the state's stamp of approval on the relationship, is an idea that would have been considered radical just a few decades ago. Giving same-sex couples these benefits, in light of the long history of persecution of homosexuals, would have been considered more than radical; it would have been tantamount to heresy. However, today large numbers of people are making the choice every day to live together as a family without obtaining the blessing of society through a marriage certificate. More and more homosexuals are making themselves visible and demanding respect and the equal treatment under the laws to which all American citizens are entitled.

The response to the quickly changing attitudes of society by some courts, legislatures, and employers has been to allow unmarried couples to enjoy at least some of the entitlements and protections that have previously been available only through marriage. With an ever-growing segment of the population increasingly demanding rights, it seems quite likely that more states will follow Hawaii's lead and implement legislation bestowing benefits similar to the RBA on unmarried couples. Whether such legislation should be directed solely at same-sex couples or should also include opposite-sex couples is largely a product of the perceived function and impact of the legislation.

The fear that allowing unmarried heterosexual couples access to these benefits will discourage marriage, while having a legitimate basis, is exaggerated. Despite the large number of couples who choose not to marry, the symbolic significance of marriage remains strong. Moreover, marriage still remains the optional choice given that the most significant marriage-related benefits, such as distribution of property, determination of child custody upon termination of the relationship, and the exemption of partner benefits from gross income, are withheld.

To those who say that there is no need to allow unmarried heterosexual couples access to these benefits because they could always attain these benefits by getting married, the most obvious response is that heterosexual relationships *are* fundamentally different from homosexual relationships because the latter is

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125. See *id.*

126. See discussion *supra* Part III.A.

127. See Hixson, *supra* note 5, at 521-22.

prohibited by law from marrying. However, this truism does not necessarily answer the question. If the goal, when drafting such a policy, is to create a second-tier station where homosexuals, presumably happy to be given rights and benefits at all, are to be placed indefinitely, then heterosexual couples should indeed be left out of the equation. However, if the goal is to recognize and support the wide diversity in the composition of families today, then the only real solution is to include heterosexual couples in the mix.

The bottom line is that the RBA, or any comparable legislation that may be passed in the future, is not marriage. It is a less advantageous alternative, in terms of rights and obligations, to marriage that unmarried heterosexual couples should have available to them if they should choose not to marry, whatever their reason may be.

# IOLTA LOST THE BATTLE BUT HAS NOT LOST THE WAR

ERIN E. HEUER LANTZER\*

## INTRODUCTION

Since its inception, the Interest on Lawyer & Trust Accounts ("IOLTA") program has come under serious attack on both ideological and constitutional levels. The purpose of the program is to fund legal aid programs through interest earned on client deposits in attorney trust accounts. Opponents of the program argue that IOLTA violates the Takings Clause<sup>1</sup> of the Fifth Amendment as well as the First Amendment right of freedom of speech.<sup>2</sup>

In resolving these issues, both clients and attorneys have called upon courts to determine whether the client has a recognizable property interest in the funds generated by the IOLTA program. The First and Eleventh Circuits of the Court of Appeals found that the client had no recognizable property interest; therefore, the Fifth and First Amendment challenges to IOLTA failed.<sup>3</sup> In 1996, contrary to previous rulings, the Fifth Circuit held that the client did have a recognizable property interest.<sup>4</sup> The Texas Supreme Court Justices (who authorized the IOLTA program) and the Texas Equal Access to Justice Foundation appealed the Fifth Circuit's holding to the U.S. Supreme Court, which finally resolved the issue by affirming the Fifth Circuit's decision.<sup>5</sup> However, the Court remanded the case to the district court to determine whether a "taking" had actually occurred.<sup>6</sup>

This Note attempts to resolve the issues surrounding the constitutionality of the IOLTA program. Part I of this Note will survey the historical development and purpose of the IOTLA program. Parts II and III will discuss the cases challenging IOLTA. Part IV will analyze relevant cases that question whether the IOLTA program "takes" clients' property in terms of the Fifth Amendment. Finally, Part V of this Note will evaluate the argument that IOLTA violates a client's First Amendment right of freedom of speech.

## I. HISTORY AND PURPOSE OF THE IOLTA PROGRAM

In the 1960s, a number of f countries developed programs in which clients'

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\* J.D., 2000, Indiana University School of Law—Indianapolis; B.A., 1997, Indiana University, Bloomington, Indiana.

1. U.S. CONST. amend V states "nor shall private property be taken for public use, without just compensation."

2. U.S. CONST. amend I.

3. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993); *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir. 1987).

4. *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

5. *See* Phillips v. Washington Legal Found., 524 U.S. 156 (1998).

6. *See id.* at 172.

trust funds were invested to fund public legal programs.<sup>7</sup> Until 1980, United States' federal law did not allow the development of these types of programs, just as federal law did not permit banks to pay interest to "demand accounts."<sup>8</sup> Attorneys are required to establish these demand accounts and to place client trust funds into them.<sup>9</sup> Yet, client funds could not earn interest if placed in an attorney's trust account.<sup>10</sup> However, in 1980, Congress passed legislation creating accounts entitled Negotiable Order of Withdrawal accounts ("NOW" accounts) that operate as interest-bearing checking accounts, provided that none of the funds in the account belong to a for-profit corporation.<sup>11</sup> By passing this legislation, Congress made possible the development of the system in the United States for funding legal aid, like those systems already established in foreign jurisdictions.<sup>12</sup>

How does IOLTA work? If a client won \$2000 in a court case, the lawyer would be obligated to place these funds along with funds from other clients into his trust account. (Over one month, the \$2000 deposit would generate \$3.30 in interest at an annual percentage rate in a money market savings account.)<sup>13</sup> The interest earned from the combined deposits in the IOLTA account is then funneled into that state's foundation or agency responsible for overseeing the IOLTA program. That agency then turns the money over to organizations that provide legal aid to the poor.<sup>14</sup>

Not all clients' funds should be placed in an IOLTA account. There are some individual client funds which are either large enough in amount or are held for such a significant length of time that they should be kept separate from the funds of other clients because they are capable of producing a significant amount of income for that client if placed in a separate trust account.<sup>15</sup> However, those

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7. See generally Taylor S. Boone, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539 (1982). These countries include Australia, Canada, and South Africa. See *id.* at 542.

8. Trust accounts are called "demand accounts" because of the duty of the lawyer to place clients' funds into "a trust account that permits withdrawal on demand." *Washington Legal Found.*, 94 F.3d at 998.

9. See Gerald A. Gordon, Note and Comment, *IOTA & Professional Responsibility in the Shadow of Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 6 J.L. & POL'Y 699, 703 (1998).

10. See *id.* at 704.

11. See 12 U.S.C. § 1832 (1994).

12. See Gordon, *supra* note 9, at 709.

13. See Clara G. Herrera, *State Legal-Aid Program Faces High Court Test*, AUSTIN AM.-STATESMAN, Jan. 13, 1998, at B1.

14. See Gordon, *supra* note 9, at 706-07.

15. See Betsy Borden Johnson, Comment, *'With Liberty and Justice for All' IOLTA in Texas—The Texas Equal Access to Justice System*, 37 BAYLOR L. REV. 725, 726 (1985); see also Anthony J. Frates, *Trust Funds: To Separate or Not to Separate*, 21 NO. 6 LAW PRAC. MGMT. 28

client funds which are nominal in amount or are held for such a short length of time that they cannot earn interest are commingled with other client funds of the same class and placed into a trust account. The interest earned on these types of funds goes into the IOLTA program.<sup>16</sup>

There are three types of IOLTA programs: mandatory, opt-out, and voluntary.<sup>17</sup> In a mandatory program, "the state requires that all lawyers' trust funds earn interest either for the client or for the specified IOLTA organizations to which contributions are made."<sup>18</sup> In an "opt-out" program, "lawyers [may] exclude themselves during an annual opt-out period if they do not [wish to] participate in IOLTA."<sup>19</sup> Finally, in a voluntary program, a non-participating attorney "may [still] impute short-term and nominal amounts to non-interest bearing [checking] accounts," while participating attorneys would open their IOLTA account and inform their local bar association that they have done so.<sup>20</sup>

After Congress passed the "NOW" legislation and IRS clearances were granted, two other obstacles existed for states to overcome before they could use IOLTA as a means of funding legal aid in the United States. First, traditional tax rules stood in the way of developing IOLTA programs because "clients would be taxed on the interest income whether or not they actually received" such income.<sup>21</sup> In response to this problem, "states applied for IRS clearances . . . that allow a client to avoid reporting the interest as part of gross income."<sup>22</sup> The IRS generally granted these clearances, but only if the states stipulated that client consent was unnecessary and was to be avoided.<sup>23</sup> "Giving the client power [to] direct[ing] the interest generated [by an IOLTA fund] would trigger the assignment of income doctrine, . . . subjecting the client to tax on the interest."<sup>24</sup> Therefore, attorneys were given exclusive decision-making power by the agencies governing the IOLTA program as to whether to place funds in IOLTA

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(1995).

16. See Johnson, *supra* note 15, at 726.

17. See Brent Salmons, *IOLTAS: Good Work or Good Riddance?*, 11 GEO. J. LEGAL ETHICS 259, 262 (1998). "Twenty-seven states have mandatory programs, eighteen states and the District of Columbia have opt-out programs, and five states have voluntary programs." *Id.* at n.33.

18. Risa I. Sackmary, Comment, *IOLTA's Last Obstacle: Washington Legal Found. v. Bar Found.'s Faulty Analysis of Attorneys' First Amendment Rights*, 2 J.L. & POL'Y 187, 192 (1994). See generally Rachael Scovill Worthington, *IOTA—Overcoming Its Current Obstacles*, 18 STETSON L. REV. 415 (1989).

19. Sackmary, *supra* note 18, at 192.

20. *Id.*

21. Salmons, *supra* note 17, at 261.

22. *Id.*

23. See *id.*

24. *Id.*; see also *Helvering v. Horst*, 311 U.S. 112, 118 (1940) (describing the assignment of income doctrine as, "[t]he power to dispose of income is the equivalent of ownership to it. The exercise of that power to procure the payment of income to another is the enjoyment and hence the realization of the income by him who exercises it.").



accounts.<sup>25</sup>

The final obstacle to implementing IOLTA programs in the United States was an ethical question. Canon 9 of the Model Code of Professional Responsibility governs the establishment and management of interest bearing attorney trust accounts.<sup>26</sup> Disciplinary Rule 9-102 prohibits an attorney from profiting from his clients' funds.<sup>27</sup> In the late 1970s, the Florida Supreme Court considered the ethical implications of the IOLTA program in light of this rule.<sup>28</sup> The court held that this rule did not prohibit attorneys from investing clients' funds in a special trust account governed by a specific trust document if strict accounting procedures were imposed on such accounts.<sup>29</sup>

The American Bar Association ("ABA") Committee on Ethics and Professional Responsibility issued a formal opinion on the ethical implications of IOLTA in response to the concerns of members of various state bars.<sup>30</sup> The ABA agreed with the Florida Supreme Court that participation in an IOLTA program does not violate an attorney's ethical obligations.<sup>31</sup> In fact, the ABA found that participation in IOLTA was consistent with an attorney's ethical obligations to assist in improving the legal system.<sup>32</sup>

As these issues were resolved, states began to develop IOLTA programs to fund public legal aid. Florida was the first to develop an IOLTA program in 1981, and the other 49 states as well as the District of Columbia have since adopted this program.<sup>33</sup> Florida's IOLTA concept spread rapidly because of the

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25. See Salmons, *supra* note 17, at 261.

26. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1999) states, "A lawyer should avoid even the appearance of impropriety, . . . and therefore commingling of funds should be avoided." See also MODEL RULES OF PROFESSIONAL CONDUCT R. 1.15 (1999).

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1999).

28. See *In re Interest on Trust Accounts*, 356 So.2d 799, 800-01 (Fla. 1978). Florida was attempting to establish an IOTLA program at this time.

29. See *id.* at 801.

30. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982); see also Kristin A. Dulong, Note, *Exploring the Fifth Dimension: IOLTA, Professional Responsibility, and the Takings Clause*, 31 SUFFOLK U. L. REV. 91 (1997).

31. See Dulong, *supra* note 30, at 101.

32. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348; MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1999); Dulong, *supra* note 30, at 101.

33. See ALA. RULE PROF. CONDUCT 1.15(g) (1999); ALASKA RULE PROF. CONDUCT 1.15(d) (1999); ARIZ. SUP. CT. RULE 44(c)(2) (1999); ARK. MODEL RULES OF PROF. CONDUCT 1.15(d)(2) (1998); CAL. BUS. & PROF. CODE § 6211(a) (1999); COLO. RULES OF PROF. CONDUCT 1.15(d) (1999); CONN. RULE PROF. CONDUCT 1.15(d) (1998); DEL. LAWYERS' RULE PROF. CONDUCT 1.15(h) (1999); D.C. RULE PROF. CONDUCT 1.15(e) (1999); FLA. BAR RULE 5-1.1 (1999); GA. CODE PROF. RESP. RULE 3-109, DR 9-102(c)(2) (1998); HAW. SUP. CT. RULE 11 (1999); IDAHO RULE PROF. CONDUCT 1.15(d) (1999); ILL. RULE PROF. CONDUCT 1.15(d) (1999); IOWA CODE PROF. RESP. FOR LAWYERS DR 9-102(A) (1999); KAN. MODEL RULE PROF. CONDUCT 1.15(d)(3) (1999); KY. SUP. CT. RULE 3.830 (1999); LA. RULE PROF. CONDUCT 1.15(d) (1999); ME. CODE PROF. RESP. 3.6(e)(4) (1999); MD. BUS. OCCUPATION & PROF. CODE ANN. § 10-303 (1998); MASS. SUP. CT.

drastic need in the 1980s to improve America's legal services for the indigent.<sup>34</sup>

The purpose of the IOLTA program is to fund legal aid for those who are unable to afford legal representation. In 1997, the program generated over \$100 million dollars nationwide, making it the second highest provider of legal aid to the poor.<sup>35</sup> An estimated 1.7 million people benefit from legal aid made possible by the IOLTA program.<sup>36</sup> Generally, funds generated by the IOLTA program are used to litigate civil matters such as wrongful eviction from homes, claims of disabled children, and domestic violence issues.<sup>37</sup> IOLTA funds are also used for educational purposes such as educating elementary and secondary school children in Oklahoma about the legal system.<sup>38</sup> Funds are given to law schools to enhance opportunities for underrepresented minorities and to finance law

RULE 1.15(d) (1999); MICH. RULE PROF. CONDUCT 1.15(d) (1999); MINN. RULE PROF. CONDUCT 1.15(d) (1999); MISS. RULE PROF. CONDUCT 1.15(d) (1999); MO. RULE PROF. CONDUCT 1.15(d) (1999); MONT. RULE PROF. CONDUCT 1.18(b) (1999); NEB. SUP. CT. TRUST ACCT. RULES 1-8 (1998); NEV. SUP. CT. RULE 217 (1998); Petition of New Hampshire Bar Assn., 122 N.H. 971, 453 A.2d 1258 (1982); N.J. RULES GEN. APPLICATION 1:28A-2(a)(1) (1999); N.M. RULE PROF. CONDUCT 16-115(D) (1998); N.Y. JUD. LAW § 497 (1999); N.C. RULE PROF. CONDUCT 1.15-3 (1998); N.D. RULE PROF. CONDUCT 1.15(d)(1) (1999); OHIO REV. CODE ANN. § 4705.09(A)(1) (1999); OKLA. RULE PROF. CONDUCT 1.15(d) (1999); OR. CODE PROF. RESP. DR 9-101(D)(2) (1999); PA. RULE PROF. CONDUCT 1.15(d) (1999) and PA. RULE DISCIPLINARY ENFORCEMENT 601(d) (1999); R.I. RULE PROF. CONDUCT 1.15(d) (1999); S.C. APP. CT. RULE 412 (1988); S.D. RULE PROF. CONDUCT 1.15(d)(4) (1999); TENN. CODE PROF. RESP. DR 9-102(C)(2) (1999); TEX. ST. BAR R., art. XI, § 5(A); *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); VA. SUP. CT. RULES, pt. 6, § 4, para. 20 (1998); VT. CODE PROF. RESP. DR 9-103 (1998); WASH. RULE PROF. CONDUCT 1.14(c)(1) (1998); W. VA. RULE PROF. CONDUCT 1.15(d) (1999); WIS. SUP. CT. RULES 13.04, 20:1.15 (1999); WYO. RULE PROF. CONDUCT 1.15(II) (1998). Indiana's program has been authorized but is not yet operational. See IND. RULE PROF. CONDUCT 1.15(d) (1999).

34. See Sackmary, *supra* note 18, at 190.

35. See Herrera, *supra* note 13, at B1. The Federal government's Legal Services Corporation is the highest provider of legal aid in the U.S., and in the 1998 budget, Congress approved \$300 million for the program, a \$17 million increase over last year. However, ABA President Phillip S. Anderson stated, "[T]his increase still leaves the program woefully underfunded; only 20 percent of the legal needs of the poor in this country are being met." *Congress Approves \$300 mil for Legal Services Corp.*, PR NEWSWIRES, Oct. 21, 1998.

36. See James Kilpatrick, *OK, Scooping Up Interest Was Wrong but \$2.19 Isn't Enough to Cause Clients Any Harm*, CHARLESTON GAZETTE & DAILY MAIL, June 26, 1998, at 4A. In Texas the IOLTA program distributed more than 5 million dollars in legal aid. See Scott Ozmun & Susan Burton, *Program Supports Legal Aid for All*, AUSTIN AM.-STATESMAN, July 3, 1998, at A15. In 1998, \$5.7 million in Washington's IOLTA program was distributed to programs that served more than 100,000 people who needed legal aid. See Susan Gilmore, *Ruling Puts Legal Aid in Jeopardy*, SEATTLE TIMES, June 17, 1998, at B3.

37. See Ozmun & Burton, *supra* note 36, at A15.

38. See Leigh Jones, *Ruling Endangers Legal Aid, Law Related Education Programs*, THE JOURNAL RECORD, July 23, 1998, available in 1998 WL 11955605.

school clinics.<sup>39</sup> Additionally, IOLTA funds have also been used to litigate issues involving gay rights<sup>40</sup> and to provide legal aid to poor immigrants trying to come to the United States.<sup>41</sup> However, the use of IOTLA funds for litigation surrounding those causes has triggered opposition to the program.<sup>42</sup>

Extensive debate exists on the subject of whether the program violates the Takings Clause of the Fifth Amendment and the First Amendment right of freedom of speech. Several courts have addressed the takings issue while the issue of freedom of speech has taken a backseat.<sup>43</sup> Opponents of the IOLTA program contend that the interest belongs to the clients and that lawyers are making decisions about how to spend money that is not theirs.<sup>44</sup> Some opponents argue that IOTLA is unconstitutional because it compels clients to support programs of the bar foundations' choosing.<sup>45</sup> IOLTA supporters argue that IOLTA is not a taking because "individually the money is not enough to warrant an interest-bearing account, but pooled together, the interest" generated on clients' funds becomes significant.<sup>46</sup> IOLTA's supporters also argue it is the duty of lawyers and the government to support legal aid funding for those who cannot afford it.<sup>47</sup>

## II. THE CIRCUIT SPLIT

### *A. The First and Eleventh Circuits Hold That a Client Had No Recognizable Property Interest*

The Eleventh Circuit Court of Appeals heard the first major challenge to the IOLTA program in *Cone v. State Bar of Florida*.<sup>48</sup> In *Cone*, a client of a law firm did not receive part of a settlement owed to her, totaling \$13.75. This amount inadvertently remained in her attorney's trust account for almost fourteen years before an attorney in the firm discovered the error. From 1981 to 1984, subject to Florida's IOTA program, the attorney placed her funds in an interest bearing

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39. See Bob Ackerman, Editorial, *Pennywise Complaint Pound Foolish Interest Follows Principles, but Motive for Suing over Lawyer's Trust Accounts Is Unprincipled Attack on the Poor*, PORTLAND OREGONIAN, June 24, 1998, at B11.

40. See Don Feder, Editorial, *Court Will Rule on IOLTA Scam*, BOSTON HERALD, Jan. 7, 1998, at 19.

41. See Herrera, *supra* note 13, at B1.

42. See *id.*

43. The only court to address the First Amendment issue was the First Circuit in *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 976-77 (1st Cir. 1993).

44. See Dan Chern, *Why Mandatory IOTLAS Should Be Eliminated*, 4 TEX. WESLEYAN L. REV. 123, 137-39 (1997).

45. See Jones, *supra* note 38; see also Dulong, *supra* note 30.

46. Jones, *supra* note 38.

47. See *id.*

48. 819 F.2d 1002 (11th Cir. 1987).

account.<sup>49</sup> When the firm discovered its error in 1984, it returned the principal amount to the client. During those three years, her principal generated \$2.25 in interest, and pursuant to IOTA, the firm gave the interest to the Florida Bar Foundation.<sup>50</sup> The client sued the Bar Foundation to recover the interest her principal had earned.

The Eleventh Circuit held that “[t]o demonstrate a constitutionally cognizable property interest [the client] must show that she had a specific and legitimate ‘claim of entitlement’” to the interest generated by her principal in her attorney’s IOTA account.<sup>51</sup> The court affirmed the district court’s finding that the client did not have a claim of entitlement in the interest due to “the economics of running an interest-producing demand accounts [] and the restrictions that federal banking law places upon [those types of] accounts.”<sup>52</sup>

The client’s funds could not have been placed in its own interest bearing account because \$13.75 would not meet the minimum balance requirements.<sup>53</sup> Even if the client’s principal could have been placed in such an account, the administrative costs of the account would significantly exceed any interest earned.<sup>54</sup> Thus, the court reasoned that “[s]tanding alone, [the plaintiff’s funds] in the IOTA account could not earn” any interest.<sup>55</sup> However, “by combining [these types of] deposits, interest income has been created which was not within the legitimate expectations of the owner of any one of the principal amounts.”<sup>56</sup>

The client relied solely on the authority of the Supreme Court’s decision in *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*<sup>57</sup> to support her contention that she had a right to the interest her principal generated.<sup>58</sup> In *Webb’s*, the Court found unconstitutional a Florida statute which declared that interest earned on interpleader funds deposited with the county court were the property of the county clerk.<sup>59</sup> The *Cone* court distinguished *Webb’s* by stating that the funds in *Webb’s* did give rise to a legitimate claim of entitlement because they were sufficient enough in amount to generate interest by themselves and were held for a sufficient period of time.<sup>60</sup> The court found that “[t]he district court in this case correctly concluded that ‘the crucial distinction is not the amount of interest earned, but that the circumstances [in *Webb’s*] led to a legitimate expectation of

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49. See *id.* at 1004 (Florida’s IOLTA program is entitled “Interest on Trust Accounts” or “IOTA.”)

50. See *id.*

51. *Id.*

52. *Id.* at 1005.

53. See *id.* at 1006.

54. See *id.*

55. *Id.* at 1007.

56. *Id.*

57. 449 U.S. 155 (1980).

58. See *Cone*, 819 F. 2d at 1006.

59. See *Webb’s*, 449 U.S. at 164-65. In *Webb’s*, the plaintiff’s principal earned over \$100,000 while in the possession of the county clerk. See *id.* at 158.

60. See *Cone*, 819 F. 2d at 1007.

interest exclusive of administrative costs and expenses.”<sup>61</sup> The court, in finding that the client did not have a recognizable property interest, held that the IOLTA program does not violate the Takings Clause of the Fifth Amendment.<sup>62</sup>

Five years later, the First Circuit Court of Appeals addressed a challenge to the IOLTA program. In *Washington Legal Foundation v. Massachusetts Bar Foundation*,<sup>63</sup> the numerous plaintiffs alleged “that they had been deprived, under the color of state law, of their rights secured by the First, Fifth, and Fourteenth Amendments of the Constitution by operation of the Massachusetts IOLTA program.”<sup>64</sup>

The court stated that “[t]o make a cognizable claim of a taking in violation of the Fifth Amendment, the plaintiffs must first show that they possess a recognized property interest.”<sup>65</sup> The court noted that “[n]ot all asserted property interests are constitutionally protected . . . as ‘a mere unilateral expectation or an abstract need is not a property interest entitled to protection.’”<sup>66</sup> In determining whether or not a client had a recognizable property interest, the court focused on the issues of “the character of the governmental action” involved and the economic interference to the client.<sup>67</sup>

The plaintiffs argued that the character of the governmental action in this case was “a physical invasion of their beneficial interests in their funds held in IOLTA accounts” because IOLTA borrows their principal to generate interest to fund the IOLTA program.<sup>68</sup> The plaintiffs claimed a physical invasion in the intangible property rights of the right to control and exclude others from the property.<sup>69</sup>

The court noted previous Supreme Court holdings recognizing that a taking is more obvious if the government action involved is a physical invasion.<sup>70</sup> The court found no physical invasion because “the IOLTA program leaves the deposited funds [of the client] untouched [and] always available to the client[.]”<sup>71</sup> Therefore, the plaintiffs did not have a property right to the interest earned on their funds held in the IOLTA accounts.<sup>72</sup>

In discussing the plaintiffs’ claim of economic interference, the court cited the principal that “[g]overnmental action through regulation of the use of private

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61. *Id.* (quoting *Cone v. Florida Bar*, 626 F. Supp. 132, 136 n.7 (M.D. Fla. 1985), *aff’d*, 819 F.2d at 1002).

62. *See id.*

63. 993 F.2d 962 (1st Cir. 1993).

64. *Id.* at 969.

65. *Id.* at 973.

66. *Id.* (quoting *Webb’s*, 449 U.S. 155, 161 (1980)).

67. *Id.* at 974 (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986)).

68. *Id.* at 974-75.

69. *See id.* at 976.

70. *See id.* at 975 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

71. *Id.* at 976.

72. *See id.*

property does not cause a taking unless the interference is significant.”<sup>73</sup> The plaintiffs argued that the IOLTA program interfered with their rights to exclude others and control their property.<sup>74</sup> The court found that there were no economic interests in those property rights claimed by the plaintiffs.<sup>75</sup> The court reasoned that those rights had no economic benefit for the plaintiffs because there were no “investment-backed expectations” in those property rights.<sup>76</sup> The court stated that in the recognized “bundle of property rights,” the plaintiffs could claim a “thin strand” at best.<sup>77</sup> “At least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.”<sup>78</sup> Weighing all of these factors, the court found that the IOLTA program did not involve a taking.<sup>79</sup>

The plaintiffs also argued that their First Amendment right of freedom of speech was violated by the IOLTA program because IOLTA compels attorneys and their clients to “participate in the IOLTA program and [therefore,] support lobbying and litigation for ideological and political causes.”<sup>80</sup> The court held that the district court also properly dismissed this claim because the IOLTA program did not involve compelled speech or constitutionally protected speech.<sup>81</sup> The court stated that the interest generated by the funds deposited in IOLTA is not the client’s property because the client “has not been compelled by the IOLTA Rule to contribute [his] money to the IOLTA program.”<sup>82</sup> Therefore, he has “not been compelled by the IOLTA Rule to join, affirm, support or subsidize ideological expression of IOLTA recipient organizations in any way.”<sup>83</sup>

### *B. The Fifth Circuit Takes a Different Approach—Recognizing the Client’s Property Interest*

In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* (“WLF”),<sup>84</sup> the District Court for the Western District of Texas held that the plaintiffs did not have a recognizable property interest in the funds generated by Texas’ IOLTA program.<sup>85</sup> The Fifth Circuit Court of Appeals

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73. *Id.* (citing *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979)).

74. *See id.*

75. *See id.*

76. *Id.*

77. *Id.*

78. *Id.* (quoting *Andrus*, 444 U.S. at 65-66.)

79. *See id.*

80. *Id.*

81. *See id.*

82. *Id.* at 980.

83. *Id.*

84. 873 F. Supp. 1 (W.D. Texas 1995), *aff’d in part, vacated in part, and rev’d in part*, 94 F.3d 966 (5th Cir. 1996), and *aff’d sub. nom Phillips v. Washington Legal Found.*, 524 U.S. 156 (1997).

85. *See id.*



reversed the district court and found that the Constitution protected a recognizable property interest.<sup>86</sup> In so holding, the court cited Texas' observation of the "rule that 'interest follows principal,' which recognizes that interest earned on a deposit of principal belongs to the owner of the principal."<sup>87</sup>

The Fifth Circuit's analysis focused on the decision of the Supreme Court in *Webb's*.<sup>88</sup> Disagreeing with the Eleventh Circuit's analysis in *Cone* that the situation in *Webb's* was distinguishable from the IOLTA program, the Fifth Circuit held that *Webb's*

creates a rule that is independent of the amount or value of interest at issue, holding that a property interest existed in the accrued interest simply because "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."<sup>89</sup>

The court found that a property interest attaches at the moment that the interest accrues.<sup>90</sup> Also, the court noted that IOLTA programs became possible only upon an IRS ruling whereby "clients would not be taxed on the interest earned on their deposits in IOLTA accounts provided that they had no choice but to participate in the program."<sup>91</sup>

The court remanded the case to the district court to determine whether a taking had occurred, noting that the plaintiffs had to "demonstrate that the taking was against the will of the owner" and that "a similar showing would also likely be necessary to prevail on the First Amendment claim."<sup>92</sup> The petitioners, including the Justices of the Texas Supreme Court and the Texas Equal Access to Justice Foundation, appealed and the U.S. Supreme Court granted certiorari.<sup>93</sup> The Supreme Court affirmed the Fifth Circuit's holding that a client has a recognizable property interest and remanded the issue of whether a taking occurred.<sup>94</sup> However, two Justices wrote persuasive dissenting opinions,<sup>95</sup> which could affect the outcome of the remaining issues to be determined in the case.

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86. See *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996 (5th Cir. 1996), *aff'd sub. nom Phillips*, 524 U.S. at 156.

87. *Id.* at 1000.

88. See *id.* at 1000-02. Recall that *Webb's* involved the Florida statute which declared that any interest earned on interpleader funds was the property of the county clerk, which the Court struck down as unconstitutional. See *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155 (1980).

89. *Texas Equal Access to Justice Found.*, 94 F.3d at 1002 (quoting *Webb's*, 449 U.S. at 164).

90. See *id.* at 1003.

91. *Id.* (citing Rev. Rul. 81-209, 1981-2 C.B. 17).

92. *Id.* at 1004 (citing *Vee v. City of Escondido*, 503 U.S. 519, 527 (1992)).

93. See *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). The Honorable Thomas R. Phillips is a Justice on the Texas Supreme Court and a petitioner in this case along with the other Texas Supreme Court Justices and the Texas Equal Access to Justice Foundation.

94. See *id.* at 172.

95. See *id.* at 172 (Souter, J., dissenting), 179 (Breyer, J., dissenting).

## II. THE *PHILLIPS* DECISION

### A. *The Majority's Approach*

Five justices on the Supreme Court held that the clients did have a recognizable property interest and that the interest income generated by funds held in IOLTA accounts is the private property of the owner of the principal.<sup>96</sup> The Court noted that "existing rules or understandings that stem from an independent source such as state law" determine the existence of a property interest.<sup>97</sup> Discussing its holding in *Webb's*, the Court stated, "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."<sup>98</sup> The Court also noted "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."<sup>99</sup>

The Court held that any interest earned attaches as a property right due to the ownership of the underlying principal, "regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds. . . ."<sup>100</sup> The Court rejected the petitioners' argument that the interest could not be private property because if no IOLTA program existed, the money would not generate net income on its own.<sup>101</sup> Citing its holding in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>102</sup> the Court stated that even though a physical item may lack a positive or economic value does not mean that it is not property.<sup>103</sup> In *Loretto*, the Court held that while the infringement on the property right arguably increased the market value of the property, it was still a taking of that property interest.<sup>104</sup> Property is more than an economic value.<sup>105</sup>

The Court found that "[w]hile the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."<sup>106</sup> The Court

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96. See *id.* Chief Justice Rehnquist authored the majority opinion and the four concurring justices were Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas. See *id.* at 158.

97. *Id.* at 164 (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

98. *Id.* at 167 (quoting *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

99. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992); *Webb's*, 449 U.S. at 163-64).

100. *Id.* at 168.

101. See *id.* at 169.

102. 458 U.S. 419 (1982).

103. See *Phillips*, 524 U.S. at 169.

104. See *Loretto*, 458 U.S. at 438 n.15.

105. See *Phillips*, 524 U.S. at 170 (citing *Loretto*, 458 U.S. at 435).

106. *Id.* (citing *Hodel v. Irving*, 481 U.S. 704, 715 (1987)).

disagreed with the petitioners' argument "that 'private property' is not implicated by the IOLTA program because the interest income generated by funds held in IOLTA is 'government-created value.'"<sup>107</sup> Interest income is not the outcome of "increased efficiency, economies of scale, or pooling of funds by the government"<sup>108</sup> and the government does not create the value; the respondents' funds do.<sup>109</sup> The Court did not consider the issues of whether the funds had been "taken by the State" or if any "just compensation" was due to the respondents and remanded those issues to the district court.<sup>110</sup>

### *B. The Dissenting Opinions*

Justice Souter and Justice Breyer each wrote dissenting opinions in *Phillips*. All four dissenting justices joined in both opinions.<sup>111</sup> Justice Souter declined to join in the Court's holding because he felt that, under Texas law, deciding just the issue of whether a client has a recognizable property interest in the income generated by the IOLTA program was an abstract decision that might ultimately have no significance in resolving the real issue of whether IOLTA violates the Takings Clause of the Fifth Amendment.<sup>112</sup>

Justice Souter stated that the Court should have decided the issues of whether a taking had occurred and whether the government owed any just compensation to the respondents.<sup>113</sup> He suggested that the IOLTA program does not violate the Takings Clause because there "is no apparent economic impact."<sup>114</sup> He also noted that any required compensation should be measured against, not the government's gain, but the claimant's loss.<sup>115</sup>

In his dissenting opinion, Justice Breyer disagreed with the majority's holding that the client had a recognizable property interest in the funds generated by the IOLTA program.<sup>116</sup> He noted that "they [the Court's previous holdings] have not said that the Constitution forces a State to confer, upon the owner of property that cannot produce anything of value for him, ownership of the fruits of that property should that property be rendered fertile through the government's lawful intervention."<sup>117</sup> Justice Breyer distinguishes the court's holding in

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107. *Id.* (quoting Brief for United States at 51 (No. 96-1578)).

108. *Id.*

109. *See id.* at 171.

110. *Id.* at 172.

111. *See id.* at 172, 179. Justice Souter's dissent was joined by Justice Stevens, Justice Ginsburg, and Justice Breyer. The same Justices, along with Justice Souter, joined in Justice Breyer's dissent.

112. *See id.* at 172 (Souter, J., dissenting).

113. *See id.* at 175.

114. *Id.* at 176. He also noted that a claimant could not reasonably expect to obtain net interest. *See id.*

115. *See id.* at 177.

116. *See id.* at 180 (Breyer, J., dissenting).

117. *Id.* at 181.

*Webb's* by stating that the principal in that case would have earned interest without state intervention, but federal law, in the absence of the IOLTA program, would prevent the client's principal from earning any interest.<sup>118</sup>

The IOLTA program suffered a loss in *Phillips* as the majority determined that a client does have a recognizable property right in the interest generated by the program.<sup>119</sup> While the program and its supporters lost this battle, the war rages on. The *Phillips* decision, in the long run, could have very little effect on the program. If the takings issue is ultimately resolved in IOLTA's favor, as Justice Souter suggested,<sup>120</sup> IOLTA will emerge victorious and continue to operate to provide legal aid to those who cannot afford legal counsel.

### C. The District Court's Decision

On remand from the United States Supreme Court, the District Court of the Western District of Texas determined that the IOLTA program does not violate the Takings Clause of the Fifth Amendment.<sup>121</sup> The District Court found that the crux of the case rested on the issue of just compensation because the Takings Clause "does not prohibit the taking of private property" but prohibits such taking without just compensation.<sup>122</sup> The court found that the client did not suffer a compensable loss because just compensation is determined not by what the taker has gained but what the owner has lost,<sup>123</sup> and in the absence of the IOLTA program, the interest generated by a client's principal would possess no economically realizable value.<sup>124</sup>

The court also addressed the issue of whether a taking had occurred even though it found that the issue was of little importance because there was no identifiable compensable loss. The Court determined that an "ad hoc" takings analysis should be applied and used the test announced in *Penn Central*.<sup>125</sup> Applying this test, the court concluded that IOLTA does not violate the Takings Clause because the economic impact of the regulation on the client "is nill."<sup>126</sup> Although IOLTA won this round of the battle, the war rages on as the District court's ruling was appealed to the Fifth Circuit Court of Appeals.<sup>127</sup>

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118. See *id.* at 182.

119. See *id.* at 172.

120. *Id.* at 176 (Souter, J., dissenting).

121. See *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp.2d 624, 647 (W.D. Tex. 2000).

122. *Id.* at 637

123. See *id.* at 637-38.

124. See *id.* at 643.

125. *Id.* at 646 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

126. *Id.* The *Penn Central* test is discussed in greater detail, *infra* Part IV.

127. See Margaret Graham Tebo, *An Ok for IOLTA*, A.B.A. J., May 2000, at 84.

#### IV. DOES IOLTA VIOLATE THE TAKINGS CLAUSE?

##### A. General "Takings" Principles

The "Takings Clause" is enumerated in the Fifth Amendment of the Constitution and provides, "nor shall private property be taken for public use, without just compensation."<sup>128</sup> The Fourteenth Amendment makes the Takings Clause applicable to the states.<sup>129</sup> There are generally two types of takings cases: those cases analyzed under the principles established by the Court in *Penn Central Transportation Co. v. City of New York*<sup>130</sup> and per se takings.<sup>131</sup>

Takings that do not involve a permanent, physical occupation of the claimant's property or that do not deprive the claimant of all of the property's economic and productive value, should be analyzed by the principles elucidated in *Penn Central*.<sup>132</sup> Per se takings are those where there is a permanent, physical occupation of the property or where the government has deprived the claimant of all of the property's economic or productive use.<sup>133</sup> In analyzing a takings question, the threshold inquiry is whether the taking is a per se taking or whether it should be analyzed by the principles set forth in *Penn Central*.

Finally, the Constitution prohibits not all takings, but only those that occur without "just compensation."<sup>134</sup> The Court has stated that just compensation requires that "[t]he owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."<sup>135</sup>

##### B. Examining IOLTA Under *Penn Central*'s Test

In *Penn Central Transportation Co. v. City of New York*,<sup>136</sup> the Court established the following factors in evaluating a takings claim: 1) "[t]he economic impact of the regulation on the claimant"; 2) "the extent to which the regulation has interfered with distinct investment-backed expectations . . ."; and 3) "the character of the governmental action."<sup>137</sup>

In its opinion in *Washington Legal Foundation v. Massachusetts Bar Foundation*,<sup>138</sup> the First Circuit, in dicta, examined IOLTA under the *Penn Central* test. After finding that the plaintiffs could not establish a tangible

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128. U.S. CONST. amend. V.

129. U.S. CONST. amend. XIV. The Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

130. 438 U.S. 104 (1978).

131. See Kevin H. Douglas, Note, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297, 1322-23 (1997).

132. See *id.* at 1323.

133. See *id.* at 1322-23.

134. U.S. CONST. amend. V.

135. *United States v. Miller*, 317 U.S. 369, 373 (1943).

136. 438 U.S. 104 (1978).

137. *Id.* at 124 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).

138. 993 F.2d 962 (1st Cir. 1993).

property interest,<sup>139</sup> the court stated that IOLTA does not constitute a taking even if the plaintiffs could show that they had a property interest in the funds generated by IOLTA.<sup>140</sup>

The court gave no weight in the plaintiff's argument that the governmental action through IOLTA effected a physical invasion of their property rights.<sup>141</sup> The court considered the economic impact on the plaintiffs and "the extent to which the regulation has interfered with distinct investment-backed expectations."<sup>142</sup> The court found that the plaintiffs had not claimed that property rights involving economic interests had been interfered with and that there were no "investment-backed" expectations in the rights (rights to control) claimed by the plaintiffs.<sup>143</sup> The court held:

Under the IOLTA Rule, the plaintiffs retain the right to possess, use and dispose of the principal sum deposited in IOLTA accounts. "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."<sup>144</sup>

The court stated that the IOLTA rule does not bring about a taking of the plaintiffs' property.<sup>145</sup>

In *Phillips v. Washington Legal Foundation*,<sup>146</sup> the Court held, in a 5-4 opinion that under Texas law, the interest income generated by funds held in IOLTA accounts is the private property of the owner of the principle for the purposes of the Takings Clause.<sup>147</sup> Justice Souter, dissenting in the opinion, disagreed with not only the holding of the majority, but also the fact that the majority did not determine whether the IOLTA program "takes" the client's property.<sup>148</sup>

In discussing the issue of whether IOLTA unconstitutionally takes the client's property, Justice Souter discussed the principles announced in *Penn Central* stating "[h]ere it is enough to note the possible significance of the facts that there is no physical occupation or seizure of tangible property. . . ."<sup>149</sup> Justice Souter also found that there is no apparent economic impact on the client because the client would have no net interest for himself, with or without IOLTA.<sup>150</sup> "[T]he facts present neither anything resembling an investment nor

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139. See *id.* at 974.

140. See *id.*

141. See *id.* at 975-76.

142. *Id.* (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 275 (1986)).

143. *Id.*

144. *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

145. See *id.*

146. 524 U.S. 156 (1998).

147. See *id.* at 172.

148. See *id.* (Souter, J., dissenting).

149. *Id.* at 176.

150. See *id.*



... any apparent basis for reasonably expecting to obtain net interest.”<sup>151</sup> Justice Souter concluded that an application of the *Penn Central* test to IOLTA would likely find that the program does not violate the Takings Clause.<sup>152</sup>

If the IOLTA program is analyzed under the *Penn Central* test, it appears that no taking has occurred. First, there is no economic impact on the claimant nor has the IOLTA program interfered with any distinct investment based expectations. If an attorney were to place all client funds in separate trust accounts for each client, in the majority of instances, the client's funds would earn no interest because any administrative costs on such accounts would be higher than any interest earned. Thus, no net interest would be earned on the account. In addition, after a client wins a judgment, generally they do not expect that the money will be invested or earn interest in the short amount of time that it will be held in the attorney's trust account. Finally, without the IOLTA program, attorney trust accounts could not be set up under current law to earn any interest.

Therefore, if the IOLTA program were analyzed under the *Penn Central* test, as Justice Souter<sup>153</sup> and the First Circuit<sup>154</sup> suggested, it does not appear that the government has taken any recognizable property interest, even though the Supreme Court found that the client does have a property interest in funds generated by IOLTA. However, some argue that the IOLTA program should be analyzed as a *per se* taking.<sup>155</sup> In those cases, it is more difficult for the government to demonstrate that a taking has not occurred.<sup>156</sup>

### C. *Per Se* Takings and IOLTA

In *Lucas v. South Carolina Coastal Council*,<sup>157</sup> the Supreme Court found “at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.”<sup>158</sup> In cases where the government regulation allows a permanent, physical invasion of privately owned property or where the “regulation denies all economically beneficial or productive use of land” a “*per se*” taking can be found.<sup>159</sup>

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151. *Id.*

152. *See id.*

153. *See id.*

154. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 976 (1st Cir. 1993).

155. *See* Douglas, *supra* note 131, at 1325.

156. *See id.*

157. 505 U.S. 1003 (1992).

158. *Id.* at 1015.

159. *Id.* at 1015-16. “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or denies an owner economically viable use of his land.’” *Id.* at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). However, the Court recognizes a narrow exception where the government may “affect property values by regulation without incurring an obligation to compensate” if acting

It is arguable that the Fifth Circuit's ruling in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*<sup>160</sup> demonstrates that the court felt that the state's action under the IOLTA program should be analyzed as a per se taking.<sup>161</sup> In its instruction on remand to the district court, the Fifth Circuit stated that the district court should find a taking if the plaintiffs "demonstrate that the taking was against the will of the property owner."<sup>162</sup> "Thus, the Texas Equal Access court made the analytical jump from holding that clients possessed a property interest in IOLTA income to concluding . . . that, absent client consent, Texas's IOLTA resulted in a taking."<sup>163</sup> The court's based its conclusion on its comparison of the IOLTA program to the Supreme Court's findings in *Loretto* and *Webb's*.<sup>164</sup>

1. *A Discussion of Per Se Takings Cases.*—Although the court did not agree with them, the plaintiffs in *Massachusetts Bar* claimed that IOLTA causes a physical taking like those found in *Kaiser Aetna v. United States*,<sup>165</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>166</sup> and *Webb's Fabulous Pharmacy, Inc. v. Beckwith*.<sup>167</sup> These cases involved per se takings.<sup>168</sup>

In *Kaiser*, the Court found a taking where the government imposed a navigational servitude requiring that owners of a private marina, who had connected their private marina to the Pacific Ocean, allow a right of access to the public.<sup>169</sup> The Court found that the government's action constituted a physical invasion of the owner's private property by the public and was an unconstitutional taking of the marina owner's right to exclude others from their private property.<sup>170</sup> In *Loretto*, a government regulation required private property owners to allow conduits for cable television to be fastened to their buildings even where the property owners did not subscribe to cable television.<sup>171</sup> The Court found that the regulation authorized a physical occupation, although a small one, of the plaintiff's private property, which was unconstitutional without compensation.<sup>172</sup>

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within the State's police power. *Id.* at 1023.

160. 94 F.3d 996 (1996).

161. See Douglas, *supra* note 131, at 1325.

162. *Texas Equal Access to Justice Found.*, 94 F.3d at 1004.

163. Douglas, *supra* note 131, at 1325.

164. See *id.*

165. 444 U.S. 164 (1979).

166. 458 U.S. 419 (1982).

167. 449 U.S. 155 (1980).

168. Some have argued that *Webb's* does not involve a "per se taking" because in *Webb's* the Court stated that the state could retain the claimants' interest to the extent the exaction constitutes a fee for services rendered. See Peter M. Siegel, *Interest on Lawyers' Trust Account Programs: Do They "Take" "Property" of the Client?*, 36 U. FLA. L. REV. 674, 746 (1984).

169. See *Kaiser*, 444 U.S. at 178-80.

170. See *id.* at 180.

171. See *Loretto*, 458 U.S. at 422-24.

172. See *id.* at 441.

As discussed in Part II, *Webb's* involved a Florida statute which allowed a county to take the interest accruing on an interpleader fund.<sup>173</sup> In *Webb's*, the plaintiff deposited nearly \$2 million into the interpleader fund, from which the clerk withdrew over \$9000 as his fee which was permitted by the statute.<sup>174</sup> The money deposited into the fund earned over \$100,000 in interest that the clerk kept.<sup>175</sup> The Court held that there was no sufficient justification for the county to take the interest on interpleaded funds, the private property of the claimants, when the county was already receiving fees for costs related to holding the funds.<sup>176</sup> The Court found that the Florida statute permitted "a taking violative of the Fifth and Fourteenth Amendments."<sup>177</sup>

The Court in *Webb's* never stated explicitly that it was applying the per se takings rule. In fact, some argue that the per se takings rule is only applicable to the state's confiscation of real estate, not money.<sup>178</sup> In *Webb's*, the Court indicated that Florida may have been able to justify retaining the claimant's interest if retaining that interest was "reasonably related to the costs of using the courts."<sup>179</sup> Here the Court's language would indicate that it did not consider Florida's action to be a per se taking.<sup>180</sup>

However, the Court in *Webb's* emphasized that Florida's action amounted to a "forced contribution" to the government, unrelated to the costs of using the courts.<sup>181</sup> The Court also stated that Florida's action was analogous to the state's action in *United States v. Causby*<sup>182</sup> in which the Court found an unconstitutional taking where the government utilized air space above the claimant's land as part of a flight plan for military aircraft, thus destroying the use of the land as a chicken farm.<sup>183</sup> By comparing *Webb's* to *Causby*, it appears that the Court was saying Florida's confiscation of the claimants' interest proceeds should be treated like the government's appropriation of the claimant's real estate in *Causby*, which constitutes a per se taking.<sup>184</sup>

2. *The Application of the Per Se Takings Rule to IOLTA.*—*Webb's* is perhaps the takings case that is most closely analogous to the IOLTA program

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173. See *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 155-56 (1980).

174. See *id.* at 156-57. The plaintiffs did not object to the clerk's statutory fee. See *id.* at 158.

175. See *id.* at 158.

176. See *id.* at 163-64.

177. *Id.* at 165.

178. For example, the Takings Clause does not prevent the government from compelling people to surrender their money under the taxing power. See Thomas E. Baker & Robert E. Wood, Jr., "Taking" a Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts, 14 TEX. TECH. L. REV. 327, 350 (1983).

179. *Webb's*, 449 U.S. at 163.

180. See Siegel, *supra* note 168, at 746.

181. *Webb's*, 449 U.S. at 163.

182. 328 U.S. 256 (1946).

183. See *id.* at 265.

184. See Douglas, *supra* note 131, at 1326-27.

because both cases involve interests generated when the claimant's principal is in the hands of a state actor. Also similar to the IOLTA program, a state actor took that interest in *Webb's*. If the property interest that a claimant has in the interest generated by the IOLTA program is an economic one, like the property interest in *Webb's*, then most likely the claimant would prevail on his claim that the government action constitutes a taking. It is very difficult for the government to prevail when a per se taking is involved.

However, unlike *Webb's*, the claimant's principal without the IOLTA program would not generate any net interest on its own.<sup>185</sup> While the *Phillips* Court determined that the claimants did have a property right in the interest generated, their decision was based primarily on the common-law notion that "interest follows principle."<sup>186</sup> Without the IOLTA program existence, an interest to follow the claimants' principle would not exist.<sup>187</sup> No argument made contends that the IOLTA program has taken the claimants' principle. It appears that, while the claimants have a property right in the funds generated by IOLTA, this right cannot be an economic one because without IOLTA their principle deposit would not generate any interest.

The majority opinion in *Phillips* recognized that "[w]hile the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."<sup>188</sup> If the property right a claimant has is not an economic one, but merely the rights of control and possession, then the IOLTA program should not be analyzed under the "per se" taking standard. The property interest that claimants have in the funds generated by IOLTA are intangible property rights and would not fit into the category of per se takings discussed above. As such, the IOLTA program should be considered under the *Penn Central* test, which would not result in an unconstitutional taking because there is no apparent economic impact on the client. However, if a per se taking could be established with regard to the IOLTA program, the court would need to address the issue of just compensation.

As discussed above, the courts have yet to determine the issue of whether or not the IOLTA program constitutes a taking of the claimant's property. In order to prevail in a takings claim, the claimant must be able to establish not only that the government took private property, but also that the government took the property without just compensation and that just compensation is owed to the claimant. Although unlikely, in the event that a court were to decide that the

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185. Both dissenting opinions in *Phillips* recognized and discussed this distinction between the IOLTA program and *Webb's*. See *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (Souter, J., dissenting), 179 (Breyer, J., dissenting).

186. *Id.* at 163-64.

187. This is quite unlike the facts in *Webb's* where the claimant's principle was substantial enough to earn interest on its own and where the Florida government took over \$100,000 of the interest generated by the claimant's principle deposit. See *Webb's Fabulous Pharm., Inc. v. Beckwith*, 449 U.S. 155, 158 (1980).

188. *Phillips*, 524 U.S. at 170 (citing *Hodel v. Irving*, 481 U.S. 704, 715 (1987)).

government did take the claimant's property, the claimant would still have to address the issue of just compensation.

#### *D. Just Compensation*

In his dissenting opinion in *Phillips*, Justice Souter noted, "for as we [the Court] have repeatedly said its [the Fifth Amendment] Takings Clause does nothing to bar the government from taking property, but only from taking it without just compensation."<sup>189</sup> Just compensation is described by the Court as "the full monetary equivalent of the property taken."<sup>190</sup> To determine the amount of just compensation owed if the regulation is found to amount to a taking, the court should attempt to place a claimant "in as good a position pecuniarily as if his property had not been taken."<sup>191</sup>

To determine what remedy would place a claimant in a position as if the taking had not occurred, a court would "look to the claimant's putative property interest as it was or would have been enjoyed in the absence of IOLTA, and consequently would measure any required compensation by the claimant's loss, not by the government's gain."<sup>192</sup>

In *Loretto*, the Court found a taking where the value of the property increased as a result of the government regulation, but unlike IOLTA, that case dealt solely with a physical occupation of private property.<sup>193</sup> "[A]s to the just compensation requirement, the client's inability to earn net interest outside IOLTA, due to the unchallenged federal and state regulations, raises serious questions about entitlement to any compensation."<sup>194</sup>

To find that an unconstitutional taking has occurred, a court must find a failure to "justly compensate" the claimant. If just compensation is available to the claimant, then there is no violation of the Constitution.<sup>195</sup> Without the IOLTA program, there would be no net interest generated on the claimants' principle held in the attorney's trust account. Net interest is only created when

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189. *Id.* at 177 (Souter, J., dissenting). See generally *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

190. *Phillips*, 524 U.S. at 177 (Souter, J., dissenting) (quoting *United States v. Reynolds*, 397 U.S. 14, 16 (1970)).

191. *United States v. 564.54 Acres Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. U.S.*, 292 U.S. 246, 255 (1934)). See generally *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

192. *Phillips*, 524 U.S. at 177 (Souter, J., dissenting).

193. See *id.* In discussing the *Loretto* Court's decision, Justice Souter further distinguished the case from the IOLTA program by stating, "it [*Loretto*] rested on no finding that value had actually been enhanced, and it held nothing about the legal consequences of an actual finding that enhancement had occurred." *Id.* See also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 n.15 (1982).

194. *Phillips*, 524 U.S. at 176-77 (Souter, J., dissenting).

195. See U.S. CONST. amend. V.

multiple clients' deposits are placed together in an attorney's trust account. Only then is the generated interest sufficient to overcome any administrative charges. The claimants' property interest, even if taken by the government, would not constitute an unconstitutional taking because no just compensation would be available to them.

The IOLTA program could win the takings war with two arguments. If the property interest in IOLTA is not economic, but instead involves only those interests of control and possession, then the program would be analyzed under the *Penn Central* test. As noted above, by analyzing IOLTA under that test, it is unlikely that a court would find that a taking occurred because no apparent economic impact on the claimant exists.

However, if a court determines that the property right in IOLTA is an economic one, under a per se takings analysis, a court could find that IOLTA is a taking of a recognizable property interest. Therefore, the issue becomes, what just compensation is owed to the claimants? Here, no just compensation would be due to the claimants because without the IOLTA program, a client's funds would generate no interest on their own. If no just compensation is available to the claimants, then the taking is not unconstitutional and the IOLTA program will continue to function.

In addition to violating the Takings Clause, some argue the IOLTA also violates the First Amendment right of freedom of speech. After the Supreme Court's ruling in *Phillips*, those who oppose IOLTA have even greater ammunition for their argument that the program violates the First Amendment. As such, IOLTA must survive another battle.

## V. IOLTA AND THE FIRST AMENDMENT

### A. General First Amendment Principles

The First Amendment of the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."<sup>196</sup> The First Amendment protects not only the right to speak but also the right not to speak.<sup>197</sup> The Supreme Court has held that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"<sup>198</sup>

In some instances, plaintiffs in litigation against the IOLTA program claimed that their First Amendment rights were violated, although this issue often takes a backseat to the takings issues discussed above.<sup>199</sup> Plaintiffs argued that the

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196. U.S. CONST. amend. I.

197. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984); see also *Wooley v. Maynard*, 430 U.S. 705 (1977).

198. *Wooley*, 430 U.S. at 714 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

199. See *Washington Legal Found. v. Massachusetts Bar*, 993 F.2d 962, 976 (1993). In *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987), this issue was not litigated. In



IOLTA program compels lawyers, and therefore clients, to participate in the program, thus forcing them to support lobbying and litigation for ideological and political causes.<sup>200</sup>

*B. The First Circuit Applies First Amendment Jurisprudence to IOLTA*

One of the only courts thus far to discuss the issue of whether the IOLTA program violates the First Amendment was the First Circuit in *Massachusetts Bar*.<sup>201</sup> The court stated that the most obvious violation of the First Amendment, when dealing with compelled speech, occurs when individuals are forced to make a direct affirmation of belief.<sup>202</sup> The First Circuit found that the IOLTA program "does not compel the plaintiffs to display, affirm or distribute ideologies or expression allegedly advocated by the IOLTA program or its recipient organizations."<sup>203</sup> Therefore, the court determined that direct compelled speech was not an issue in the case.<sup>204</sup> However, the court recognized that compelled financial support of an organization entering into expressive activities might also encumber First Amendment rights.<sup>205</sup> The Supreme Court has found that compelled financial support of organizations, such as bar associations and unions, burdens First Amendment rights when such funds are used to support political or ideological activities.<sup>206</sup> The *Massachusetts Bar* court stated that the following issues were dispositive in addressing the plaintiffs' First Amendment claims:

[1]) whether the IOLTA Rule burdens protected speech by forcing expression through compelled support of organizations espousing ideologies or engaging in political activities. [2]) If so, we will strictly

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*Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1004 (1996), *rev'd sub nom, Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Fifth Circuit remanded the First Amendment issue to the District Court, but the Supreme Court did not mention the First Amendment issue in its opinion.

200. See *Massachusetts Bar*, 993 F.2d at 976.

201. See *id.*

202. See *id.* at 977; see also *Barnette*, 319 U.S. at 633 ("[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . .").

203. *Massachusetts Bar*, 993 F.2d at 977.

204. See *id.*

205. See *id.*

206. See *id.*; see also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (sanctioning union expenditures of dues on expenses not expressly authorized by statute and for national affiliate activities that benefitted local union members); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (finding that the use of compulsory bar membership dues to finance political activities, such as lobbying governmental agencies, with which members disagreed, violated First Amendment Rights.). But see *Board of Regents of Univ. of Wisc. v. Southworth*, 120 S. Ct. 1346 (2000) (holding that the First Amendment permits a public university to charge its students an activity fee used to fund extracurricular student speech and finding that an optional or refund system is not a constitutional requirement).

scrutinize the IOLTA program to determine whether the IOLTA Rule serves compelling state interests through means which are narrowly tailored and germane to state interests.<sup>207</sup>

The court found that the IOLTA program was compulsory as to both attorneys and clients.<sup>208</sup> The Massachusetts IOLTA Rule, a mandatory program, obligates lawyers to deposit client funds that meet certain specifications into IOLTA accounts.<sup>209</sup> The plaintiff's attorneys claimed that avoiding the IOLTA Rule would significantly limit their practice of law and have a negative affect upon their livelihood.<sup>210</sup> The court accepted these allegations as true and agreed that an attorney's practice of law would be limited if they refused to represent client's whose funds would be mandatorily placed in IOLTA accounts.<sup>211</sup> As to the client-plaintiffs, the court stated, "[a]lthough the IOLTA Rule does not directly regulate clients, its effect is compulsory because lawyers generally deposit appropriate funds from clients into IOLTA accounts without the knowledge or consent of their clients."<sup>212</sup>

While that issue was resolved in favor of the plaintiffs, the court found that the IOLTA program did not compel speech by the plaintiffs.<sup>213</sup> The plaintiffs argued that they were required to finance the IOLTA program's recipient organizations in the same manner that bar association and union members have been compelled to support political and ideological activities through fees and dues, which the Supreme Court has found unconstitutional.<sup>214</sup> The First Circuit found this argument unpersuasive because, unlike the cases relied upon by the plaintiffs, it could not find a significant connection between these plaintiffs and the IOLTA program such that it was reasonably understood that the plaintiffs are supporting a message promulgated by organizations receiving funds from IOLTA.<sup>215</sup> To affect First Amendment rights, this nexus must be present.<sup>216</sup> The court found that the plaintiffs "have not been compelled by the IOLTA Rule to join, affirm, support, or subsidize ideological expression of IOLTA recipient

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207. *Massachusetts Bar*, 933 F.2d at 977.

208. *See id.* at 978.

209. *See id.* For a discussion of mandatory, opt-out, and voluntary programs and the types of client funds that may be placed in IOLTA accounts, see *supra* Part I.

210. *See Massachusetts Bar*, 933 F.2d at 977.

211. *See id.*

212. *Id.*

213. *See id.* at 980.

214. *See id.* at 978-79; *see also* *Keller v. State Bar of Cal.*, 496 U.S. 1, 14 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (Non-union teachers were compelled to pay a service charge to the union that negotiated their collective bargaining agreement. The teachers claimed that their service charge was used to express political opinions and support candidates that they did not support. The Court held that this was compelled speech and violated the First Amendment.)

215. *See Massachusetts Bar*, 933 F.2d at 979.

216. *See id.*

organizations in any way."<sup>217</sup> After resolving this issue, the court did not consider it necessary to determine whether the IOLTA program serves a compelling state interest.<sup>218</sup>

*C. Analyzing IOLTA as a Possible Violation of the First Amendment  
After Phillips*

*1. The Connection Between Claimants and the Recipient Organizations.*— Even the *Massachusetts Bar* court agreed that clients subject to a mandatory IOLTA program are compelled to support IOLTA and its recipient organizations.<sup>219</sup> Once the court makes this determination, the issue then becomes whether the "connection" between clients and the recipient organizations that IOLTA supports is such that clients "reasonably understand that they are supporting the message propagated by the recipient organizations."<sup>220</sup> IOLTA does not engage in any political or ideological activities, but simply funds organizations, that, at times, support litigation associated with political or ideological causes.<sup>221</sup>

In *Carrol v. Blinken*,<sup>222</sup> university students disagreed with a university policy that forced them to pay mandatory student association fees. The students opposed paying the dues because the association made contributions to an interest group whose political activities the students found objectionable.<sup>223</sup> The defendants argued that the connection between the students and the interest group was too attenuated because the student fee supported over 100 groups and was paid by thousands of students in some of its brochures.<sup>224</sup> However, the Second Circuit did not agree with this argument because the interest group in question stated in some brochures that it represented all fee paying students.<sup>225</sup> Also, the court felt that outsiders could feasibly link the students with "at least some causes pursued by student organizations, especially when those causes are furthered off campus."<sup>226</sup> The court concluded that a tight relationship between the plaintiffs and the financial beneficiary was not required.<sup>227</sup>

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217. *Id.* at 980. The court based part of its conclusion on its finding that the plaintiffs did not have a property interest in the funds generated by IOLTA. *See id.* Since the Supreme Court's holding in *Phillips*, this assumption is no longer correct. The fact that the claimants now have a recognized property interest will be addressed as to the First Amendment claims, *infra*.

218. *See id.*

219. *See id.* at 978.

220. *Id.* at 979.

221. *See supra* notes 38-39, 41 and accompanying text.

222. 957 F.2d 991 (2d Cir. 1992).

223. *See id.* at 993-94.

224. *See id.* at 998.

225. *See id.*

226. *Id.*

227. *See id.* at 998-99.

In *Keller v. State Bar of California*,<sup>228</sup> attorneys had to pay membership dues to the state bar as a condition of practicing law in California.<sup>229</sup> The bar used these dues for self-regulatory functions, but also to lobby the legislature and other government agencies, file amicus curiae briefs in pending cases, and fund other activities to which the plaintiffs objected.<sup>230</sup> The Court held that the State Bar's use of compulsory fees to finance political and ideological activities violated the plaintiffs First Amendment rights when such fees were not used for the purpose of regulating the legal profession or improving the quality of legal services.<sup>231</sup>

In *Hays County Guardian v. Supple*,<sup>232</sup> a case similar to *Carrol*, students had to pay fees that essentially conscripted the students into membership with a public interest group that the some students found offensive.<sup>233</sup> Unlike *Carrol*, the court rejected the students' First Amendment claims. The Fifth Circuit found that the association's fees were justified because they enhanced the overall exchange of information, ideas, and opinions on the campuses.<sup>234</sup>

The IOLTA program is distinguishable from cases where plaintiffs claim that compelled payment of mandatory dues to fund groups that support ideological or political causes violates their First Amendment Rights. Neither clients nor attorneys are forced to join IOTLA recipient organizations. While the courts may not require a "tight connection" between those objecting to the fee and the organization being funded,<sup>235</sup> the connection between those funding IOLTA, clients, and IOLTA recipient organizations is tenuous. There is no direct connection between attorneys or clients and IOLTA recipient organizations because the agency that distributes IOLTA funds is an intermediary between those two groups.

In comparing the IOLTA program to the facts in *Carrol* and *Keller*, significant differences exist. In *Carrol*, the organization supporting objectionable political causes specified in their materials that they represented all of the students who paid fees.<sup>236</sup> In *Keller*, there is an obvious connection between state bar activities and the attorneys supporting those activities with mandatory dues.<sup>237</sup> However, with IOLTA, a client probably could not determine whether the interest generated from his principle deposit went to an objectionable recipient organization. Numerous organizations receive IOLTA funds. Furthermore, it may not be clear that IOLTA funds have been used to support objectionable organizations.

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228. 496 U.S. 1 (1990).

229. See *id.* at 5.

230. See *id.*

231. See *id.* at 16.

232. 969 F.2d 111 (5th Cir. 1992).

233. See *id.* at 123.

234. See *id.*

235. *Carrol v. Blinken*, 957 F.2d 991, 998 (2d Cir. 1992).

236. See *id.* at 994.

237. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 5 (1990).

It is difficult to draw a reasonable connection between clients and recipient organizations to show that the client, through his compelled support, is actually endorsing the message promulgated by the recipient organization because no direct link exists. However, if a court finds a sufficient connection between clients and the recipient organizations, the court would then apply the test of strict scrutiny to determine if the IOTLA program serves a compelling state interest.<sup>238</sup>

2. *Applying the Strict Scrutiny Test to IOLTA.*—The Supreme Court has developed a balancing test to determine whether a First Amendment right is burdened by governmental action.<sup>239</sup> This test provides that a court make an inquiry as to whether the regulation in question serves a compelling state interest through means which are narrowly tailored to that state interest.<sup>240</sup>

IOLTA's goal is to provide legal aid to impoverished citizens, thus giving them access to the legal system that they otherwise could not afford.<sup>241</sup> IOLTA's opponents argue that "[t]he program burdens the First Amendment rights of citizens, who have no responsibility for the increased needs of legal services and who obtain no help from the IOLTA program."<sup>242</sup> Whether or not providing legal aid is a compelling state interest, the IOLTA program arguably may not qualify as "narrowly tailored" to meet that objective.

IOLTA's objectives can be achieved through less restrictive means.<sup>243</sup> Mandatory IOTLA programs are only one category of IOTLA programs that are functioning in the United States today.<sup>244</sup> The other two categories of IOLTA programs, opt-out and voluntary, would not burden the First Amendment rights of attorneys or clients because they would not be compelled by a state actor to support the program.<sup>245</sup> "Although mandatory IOLTA accounts earn more than both voluntary and 'opt-out' programs, the additional money which may be earned does not excuse the serious impingements on attorneys' First Amendment rights."<sup>246</sup>

Although unlikely, if a court found a reasonable connection between claimants and the IOLTA recipient organizations, the IOLTA program would most likely not survive the strict scrutiny test, as most regulations do not. However, if a court found that no such connection exists, the mandatory IOLTA programs would not violate the First Amendment of the Constitution even though the program implicates compelled speech.

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238. See *Washington Legal Found. v. Massachusetts Bar*, 993 F.2d 962, 976 (1993).

239. See *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

240. See *id.* at 623.

241. See *supra* notes 17-20 and accompanying text.

242. Terence E. Doherty, *The Constitutionality of IOLTA Accounts*, 19 WHITTIER L. REV. 487, 527 (1998).

243. See *id.*

244. See *supra* notes 17-20 and accompanying text.

245. See Sackmary, *supra* note 18, at 210.

246. *Id.*

*D. The District Court's Decision in Washington Legal Foundation v. Texas Equal Access to Justice Foundation*

Although neither the Fifth Circuit Court of Appeals nor the United States Supreme Court directly addressed the First Amendment challenge to IOLTA, on remand from the *Phillips* decision, the District Court for the Western District revisited the issue in its opinion in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*.<sup>247</sup> The district court found that the IOLTA program does not violate the First Amendment.<sup>248</sup> The plaintiff argued that the IOLTA program compelled him to speak in violation of the First Amendment. To establish this claim, a plaintiff has to show that he would be identified with a message he finds objectionable.<sup>249</sup> The court found that no specific message was dictated by the variety of legal services that are funded by the IOLTA program and the plaintiff failed to establish that he was being identified with expressive activities to which he objects.<sup>250</sup>

The plaintiff also argued that his First Amendment rights were violated because IOLTA compels him to financially support private organizations to which he objects.<sup>251</sup> A claim of compelled contribution requires the plaintiff to show that 1) there was an involuntary contribution; 2) the message supported by the involuntary contribution must be political or ideological; and 3) even when the message supported by the involuntary contribution is political or ideological, no First Amendment violation exists if the message supports the government's policy interests.<sup>252</sup>

The district court made an assumption that the plaintiff was required to involuntarily contribute to the IOLTA program.<sup>253</sup> The court stated that the concept of helping to ensure the availability of legal services to low income citizens is a non-controversial idea that does not qualify as a political or ideological activity. However, the use of IOLTA proceeds "in funding certain litigation could be ascribed certain political or ideological components and therefore potentially qualify as an expressive activity . . . ."<sup>254</sup>

Although the plaintiff met the first two requirements to establish a claim of compelled financial contribution, the court held that his First Amendment claims failed under this theory because the IOLTA program supports a core government function by providing access to the Texas justice system.<sup>255</sup> The court found that

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247. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp.2d 624 (W.D. Tex. 2000).

248. *See id.* at 636.

249. *See id.* at 633; *see also* *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 87-88 (1980).

250. *See id.* at 633-34.

251. *See id.* at 634.

252. *See id.*; *see also* *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990).

253. *See Texas Equal Access to Justice Found.*, 86 F. Supp.2d at 635.

254. *Id.*

255. *See id.* at 635-36.



the sole purpose of the IOLTA program is to fund legal services for the poor, a core government interest, and therefore, the plaintiff's claim of compelled financial contribution failed.<sup>256</sup>

### CONCLUSION

Proponents of mandatory IOLTA lost an important battle for the first time when the Supreme Court determined in *Phillips* that clients do have a property interest in the funds generated by the IOLTA programs.<sup>257</sup> While this decision dealt a blow to the IOLTA program, the program still has battles to fight, and should in the end, become the ultimate victor.

The prominent issue in litigation surrounding the IOLTA program is the idea that IOLTA violates the Takings Clause of the Fifth Amendment of the Constitution. The most important inquiry here is whether to apply to the program the standards developed in *Penn Central* or the per se takings rule. If the *Penn Central* test is applied to the IOLTA program, many agree that IOLTA would survive and would not be found to violate the Takings Clause because there is no apparent economic impact on the claimant. If the IOLTA program is examined under the per se takings rule, the question becomes more difficult to answer.

However, IOLTA would most likely not be scrutinized under the per se takings test. As the Supreme Court suggested in *Phillips*, the property rights that a client has in the interest generated by the IOLTA program might not be economic ones. Per se takings cannot involve the intangible property rights of control and possession that the Court suggested the clients might have. Also, in his dissent, Justice Souter mainly focused on applying IOLTA to the *Penn Central* test. Finally, a taking is not unconstitutional unless just compensation is unavailable to the claimant.<sup>2</sup> Here, just compensation would not be available to the client because without the IOLTA program, the client's principle would earn no interest; therefore, there could be no taking of the client's property interest.

The secondary issue in IOLTA litigation revolves around First Amendment Rights. The First Circuit dismissed this issue in *Massachusetts Bar*. That court found that the IOLTA program did involve compelled speech, but the First Amendment was not violated because no reasonable connection existed between the plaintiffs and the recipient IOLTA organizations. The First Circuit's analysis of the issue is convincing; however, if a court were to find that there was a sufficient connection between the plaintiffs and the recipient organizations, the mandatory IOLTA program would likely fail the strict scrutiny standard in determining whether IOLTA serves a compelling state interest. The IOLTA program would fail because IOLTA may not qualify as "narrowly tailored" to serve a compelling state interest. Unfortunately, it might be possible, although hopefully unlikely, for a court to find mandatory IOLTA programs unconstitutional yet, mandatory programs are only one type of IOLTA program.

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256. See *id.* at 636.

257. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 (1998).

There are less restrictive means, such as enacting "opt-out" or voluntary programs, which would not violate the First Amendment because in these types of IOLTA programs there is no compelled speech.

The IOLTA program won another battle when on remand from the United States Supreme Court's decision in *Phillips*, the District Court for the Western District of Texas held that the IOLTA program does not violate either the Fifth Amendment Takings Clause or the First Amendment. The court found that the IOLTA program does not violate the Takings Clause because the client did not suffer a compensable loss and there is no apparent economic impact to the client. Also, IOLTA did not violate the First Amendment because the client could not prove that he was being identified with expressive activities to which he objected. Finally, although the client was financially compelled to support private organizations to which he objected, there was no First Amendment violation because the IOLTA program supports a core governmental function.

Courts should not find that the IOLTA program violates the Constitution. If IOLTA loses this war, the real loser will not be the program, but those people who are unable to afford legal counsel. If states lose this money, they will have to tighten the budgets for their legal aid programs and will not be able to reach as many people in need. The mandatory IOLTA programs in this country make it possible for many people to get the legal help that they need. While voluntary and "opt-out" IOLTA programs also generate a significant amount of funds for legal aid, they do not come close to the amount of funding that mandatory IOLTAs provide.

Realistically, the client loses nothing in the IOLTA program. If this program were not in place, his principle deposit would make no interest. Even with the IOLTA program, the client's deposit earns a minuscule amount of interest that only adds up to a significant when interest generated from all client funds is pooled together. With the program, the client receives nothing; without the program, he receives nothing. If mandatory IOLTA programs were found unconstitutional, those unable to afford legal counsel in this country would suffer a devastating setback.



# CHIPPING AWAY AT THE STONE WALL: ALLOWING FEDERAL COURTS TO IMPOSE NON-COMPENSATORY MONETARY SANCTIONS UPON ERRANT ATTORNEYS WITHOUT A FINDING OF CONTEMPT

GREG NEIBARGER\*

## INTRODUCTION

In today's crowded federal courts, district court judges often battle with attorneys to assure that cases are litigated in a reasonable and timely manner. Mirroring the increase in the number of cases in federal courts, the discovery abuses, including egregious abuses, also increased.<sup>1</sup> These abuses inevitably cause undue delay and impede the efficient administration of justice.

Some discovery abuses are intentional and are part of a well thought out litigation plan. In essence, well-funded litigants can make economic decisions to stonewall discovery and delay a timely result by throwing money at a case in hopes of outlasting their adversary. *Baker v. General Motors Corp.*<sup>2</sup> exemplifies this abuse and typifies what is wrong with litigation today. In *Baker*, the plaintiff sought various documents relating to complaints received by the defendant regarding the vehicle type that was the subject of the suit. Counsel for General Motors ("G.M.") stated, "[w]e cannot produce what we do not have," and explained that many of the complaints had been destroyed under G.M.'s document retention policy.<sup>3</sup> Counsel maintained this position until the eve of trial. After extensive investigation, plaintiffs discovered that G.M. possessed the requested documents, that these documents had been produced in other litigation, and that G.M. had even given some of the documents to the National Highway Transportation Safety Administration.<sup>4</sup> Two days before trial, defense counsel produced five hundred documents they had previously claimed did not exist.<sup>5</sup>

District Court Judge Joseph E. Stevens described the intent of these disrespectful and war-like tactics:

There is no doubt that the discovery in this case has been extraordinarily expensive and we do not have to look very far to explain that fact. Through the long discovery history in this case, the parties have held

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\* J.D., 1999, Indiana University School of Law—Indianapolis; B.S., 1996, University of Missouri.

1. See generally *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357-58 (D. Conn. 1981).

2. 159 F.R.D. 519 (W.D. Mo. 1994), *rev'd in part on other grounds*, 86 F.3d 811 (8th Cir. 1996).

3. *Id.* at 522 (quoting letter from David Kelly, Counsel for Defendant, to J. Kent Emison, Counsel for Plaintiffs, July 21, 1993, attached to Plaintiff's Motion for Summary Judgment as Exhibit J).

4. See *id.*

5. See *id.*

numerous conferences in person and by telephone. From the beginning, this Court tried to relate to defense counsel and through them to their client that trial by ambush or by delay is no longer acceptable in federal court, and certainly not in the Western District of Missouri. At the very first discovery conference in 1992, the Court instructed defense counsel to send a photocopy of Rule 37 to the defendant, because this Court will not permit the biggest best-funded party to win solely because they can hold out the longest. It is clear by the proceedings reflected in the entire record of this case that this Court's warning was not heeded. General Motors clearly believed that it should do all in its power to wear the plaintiffs out through a litigation strategy of feast and famine. Plaintiffs were forced to starve on incomplete discovery responses during the early part of the case, and then feast on thousands of documents on the eve of trial. Although it is a strategy that may well assure a defense victory if permitted to go unchecked, this Court will not allow such tactics to tip the scales of justice.<sup>6</sup>

This Note, in accordance with the conclusions of courts with similar viewpoints,<sup>7</sup> suggests imposing non-compensatory monetary sanctions upon attorneys, without requiring a finding of contempt, as an appropriate sanction for the sort of discovery abuse that Judge Stevens found intolerable.<sup>8</sup> Imposing non-compensatory sanctions against the errant attorney attacks discovery abuses at their source, adequately deters similar future abuses, and preserves the judicial preference for trial on the merits. In *Baker*, the district court judge turned to Federal Rule of Civil Procedure 37 to impose sanctions.<sup>9</sup> The district court judge

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6. *Id.* at 526.

7. *See, e.g.,* *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983); *In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976); *Pereira v. Narragansett Fishing Corp.* 135 F.R.D. 24 (D. Mass. 1991); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981).

8. For the purposes of this Note, the term "non-compensatory monetary sanctions" means any monetary sanctions imposed by a district court in excess of costs and expenses, including attorney's fees and any amount the court deems appropriate as the reasonable fee for its time, which results from the failure to comply with the court's discovery order.

9. The relevant portion of Rule 37, subsection (b), reads in its entirety:

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

opted for more severe sanctions than non-compensatory monetary sanctions. The court ordered the defendant's affirmative defenses be stricken and that the defective nature of the vehicle be taken as established.<sup>10</sup> Unfortunately, the sanctions imposed by the district court were overturned on appeal, and the attorneys' egregious discovery abuses went unpunished and undeterred.<sup>11</sup>

The Eighth Circuit's review of the sanctions in *Baker* is problematic. First, the Eighth Circuit seems to have performed a de novo review instead of the abuse of discretion standard dictated by the Supreme Court.<sup>12</sup> Furthermore, the Eighth Circuit reversed the district court's order of sanctions because it was not "just" or specifically related to the discovery abuses.<sup>13</sup> The Eighth Circuit also stated that the district court should have looked at less severe sanctions.<sup>14</sup> Had the judge imposed lesser sanctions, his ruling may have been upheld on appeal. Nevertheless, it is troubling that such egregious abuses can occur and go unpunished because of judicial limitations placed upon Rule 37.

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(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37.

10. See *Baker v. General Motors Corp.*, 86 F.3d 811, 814-15 (8th Cir. 1996).

11. See *id.* at 817 (remanding the district court for imposition of less severe sanctions).

Further, as of the date of this publication, the sanctions are still being held under advisement by a new district court judge. The original judge, J. Joseph E. Stevens, is now deceased.

12. See *Pierce v. Underwood*, 487 U.S. 552, 552 (1988).

13. *Baker*, 86 F.3d at 817.

14. See *id.*



This Note focuses on the appropriateness of imposing non-compensatory monetary sanctions on attorneys, without a finding of contempt, for discovery abuses. Part I provides background information, including definitions of key terms and the requirements for imposing sanctions. Part II discusses the difference between civil and criminal contempt, as well as the inapplicability of civil contempt to the problem. Part III discusses how various courts have addressed non-compensatory monetary sanctions. Finally, Part IV suggests reasons why non-compensatory monetary sanctions should be allowed when the sanctioned party is an attorney and will discuss how these monetary sanctions differ from a finding of criminal contempt.

## I. BACKGROUND AND DEFINITIONS

### A. *General Background Information*

The sanctions allowed by Rule 37 are flexible enough to effectively sanction errant attorneys. Attorney discovery abuses range from negligent behavior to intentional or willful disobedience of a court's order as was the case in *Baker*.<sup>15</sup>

Correspondingly, the judicial arsenal contains a flexible array of sanctions. To combat discovery abuse, district courts must look to Federal Rule of Civil Procedure 37 as the exclusive remedy for noncompliance with discovery orders.<sup>16</sup> Rule 37 lists a variety of sanctions a court may employ and authorizes any other orders (sanctions) which are "just." The listed sanctions district court judges may order under Rule 37 include: fees and expenses,<sup>17</sup> deeming matters admitted,<sup>18</sup> preclusion orders,<sup>19</sup> striking of pleadings,<sup>20</sup> dismissal or default,<sup>21</sup> contempt,<sup>22</sup> disallowing use of information at trial,<sup>23</sup> and instructing the jury on misconduct.<sup>24</sup> The final paragraph of Rule 37(b)(2) states:

In lieu of any of the foregoing orders or in addition thereto, the court

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15. A substantial number of discovery abuses that face courts today, like attorney misconduct, are the result of negligent behavior rather than intentional or willful disregard. This distinction is significant because the contempt power utilized by federal courts requires willful, or in some instances reckless, disregard for judicial authority. See 18 U.S.C. § 401 (1994). In essence, the contempt power requires the court to actually determine a lawyer's motive for noncompliance with an order. In contrast, a district court may impose sanctions under Rule 37 for negligent noncompliance with an order. See *infra* notes 40-42 and accompanying text.

16. See *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207-08 (1958).

17. FED. R. CIV. P. 37(a)(4)(A); 37(c)(1); 37(c)(2); 37(d); 37(g).

18. See *id.* 37(b)(2)(A).

19. See *id.* 37(b)(2)(B).

20. See *id.* 37(b)(2)(C).

21. See *id.*

22. See *id.* 37(b)(2)(D).

23. See *id.* 37(c)(1).

24. See *id.*

shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.<sup>25</sup>

While non-compensatory monetary sanctions are not specifically listed in Rule 37, it cannot be said that they are forbidden by the rule. The listed sanctions of Rule 37 are not exhaustive and the rule gives judges wide discretion to impose other sanctions.<sup>26</sup> As long as the sanction is "appropriate," the Federal Rules of Civil Procedure "place virtually no limits on judicial creativity."<sup>27</sup> Therefore, any sanction that can be classified as "just" is available under Rule 37.<sup>28</sup>

Despite the wide discretion given to district court judges in formulating sanctions under Rule 37, a split in authority has developed within the circuit courts as to whether a district court may impose monetary sanctions in excess of the "reasonable expenses" expressed in Rule 37(b)(2), without requiring a finding of contempt. Two diametrically opposed positions have developed. One position is that the only monetary sanctions authorized by Rule 37(b)(2), absent a finding of contempt, are the compensatory sanctions found in its final paragraph.<sup>29</sup> The opposing view is that non-compensatory monetary sanctions are authorized under the first paragraph of Rule 37(b)(2), which states that the court "may make such orders in regard to the failure [to comply with discovery orders] as are just."<sup>30</sup>

Recently, the Tenth Circuit addressed the issue of whether a district court has the power to impose non-compensatory monetary sanctions against errant lawyers under Rule 37. In *Law v. National Collegiate Athletic Association*,<sup>31</sup> the court equated the imposition of non-compensatory monetary sanctions with criminal contempt.<sup>32</sup> The court assumed that it must resort to its contempt power to impose monetary sanctions beyond reasonable costs and expenses.<sup>33</sup> The Tenth Circuit reasoned that since the non-compensatory sanctions were neither compensatory nor avoidable by compliance with issued orders, the district court could not have been operating under its civil contempt power, and thus, must have been operating under its criminal contempt power.<sup>34</sup> The court went on to

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25. FED. R. CIV. P. 37(b)(2).

26. See *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 n.6 (1st Cir. 1990).

27. *Id.*

28. *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D. Puerto Rico 1994).

29. See *Martin v. Brown*, 63 F.3d 1252, 1263 (3d Cir. 1995).

30. FED. R. CIV. P. 37(b)(2).

31. 134 F.3d 1438 (10th Cir. 1998).

32. See *id.* at 1442.

33. See *id.*

34. See *id.* at 1443.

conclude that the sanctioned individual should have been afforded the additional due process concerns associated with criminal contempt proceedings.<sup>35</sup>

In contrast, other circuit and district courts have allowed non-compensatory monetary sanctions against errant attorneys without requiring a finding of criminal contempt and the higher degree of due process associated with criminal proceedings.<sup>36</sup> Unlike the Tenth Circuit, these courts focused on the general purpose of Rule 37 and the plain meaning of Rule 37(b)(2) to conclude that a finding of contempt is permissive, instead of required.<sup>37</sup> In short, these courts concluded that Rule 37(b)(2) and the inherent power of federal courts allow for monetary sanctions in excess of "reasonable expenses" caused by the failure of an attorney to comply with a discovery order without having to resort to the court's contempt power.

### B. Requirements for Imposing Sanctions

Before a district court imposes sanctions, it must first satisfy several requirements. First, a district court judge must find a *failure* to comply with a discovery order.<sup>38</sup> Next, the district court judge must find that there is *no substantial justification* for the noncompliance and that the circumstances surrounding the sanctions do not make the imposition of sanctions unjust.<sup>39</sup> Finally, the district court judge must determine the *proper person* to receive the sanctions.

First and foremost, there must be a *failure* to comply with a discovery order. Rule 37(b) is entitled "Failure to comply with order," and a willfulness requirement should not be read into the rule. In 1970, the Rule was amended by substituting the word "failure" for "refusal." This change was made to destroy the willfulness requirement that had been read into the rule by many courts<sup>40</sup> and to harmonize the rule with the interpretation of *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*,<sup>41</sup> in which the Supreme Court expressly rejected the argument that Rule 37(b) requires a finding of willfulness or bad faith before sanctions can be imposed. The court ruled that a district court may impose sanctions once it determines that the failure to comply with a discovery order has been due to "willfulness, bad faith, or any

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35. See *id.* at 1444.

36. See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983); *In Re Sutter*, 543 F.2d 1030 (2d Cir. 1976); *Pereira v. Narragansett Fishing Corp.* 135 F.R.D. 24 (D. Mass. 1991); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981).

37. See, e.g., *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 338 (D. Conn. 1981).

38. See FED. R. CIV. P. 37(b).

39. See *id.*

40. See FED. R. CIV. P. 37 advisory committee's notes (1970).

41. 357 U.S. 197, 207-08 (1958); see also FED. R. CIV. P. 37 advisory committee's notes (1970).

fault of [the person in noncompliance],” but not inability.<sup>42</sup> Under this rule it would appear that noncompliance due to negligent conduct could constitute a failure under Rule 37(b).

Once a district court determines that there has been a failure to comply with a discovery order, it must determine whether the failure was *substantially justified*. Rule 37 (b)(2) states that “the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorneys fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.”<sup>43</sup> Thus, sanctions are inappropriate if there is a substantial justification for the failure to comply with the discovery order or the circumstances are such that imposing sanctions would be unjust. “The burden of establishing substantial justification is on the party being sanctioned.”<sup>44</sup> Consistency in interpreting the language of Rule 37 dictates that the burden of establishing circumstances that cause the imposition of unjust sanctions would also fall upon the non-complying person. The Supreme Court has clarified that an individual’s discovery conduct is likely *substantially justified* under Rule 37 if it arises out of a “genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.”<sup>45</sup> Unfortunately, the Court has not identified what circumstances make the imposition of sanctions unjust.<sup>46</sup> This factor seems to be one left to the trial judge’s discretion. Nonetheless, the imposition of sanctions is inappropriate if there is a substantial justification or if special circumstances make imposing sanctions unjust.

If a district court determines that there has been a failure to comply with a discovery order, but does not find that the failure was substantially justified or that the circumstances would make the imposition of sanctions unjust, it must next decide who to sanction. Rule 37 subsections (a) and (b) permit the court to impose sanctions upon a party, the party’s attorney or both. The rule establishes no preference between the two. In *Devaney v. Continental American Insurance Co.*,<sup>47</sup> the Eleventh Circuit stated that Rule 37(b) dictates that “when an attorney advises [] client[s] in discovery matters, he assumes a responsibility of professional disposition of that portion of the lawsuit and may be held accountable for positions taken or responses filed during that process.”<sup>48</sup> This

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42. *Societe Internationale*, 357 U.S. at 212.

43. FED. R. CIV. P. 37(6)(2).

44. *Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group*, 55 F.3d 463, 466 (9th Cir. 1995) (citing *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994), *overruled on other grounds by* *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 202 (1999) (overruling the finding in *Telluride* that sanctions are immediately appealable).

45. *Pierce v. Underwood*, 487 U.S. 562, 565 (1988) (citations omitted).

46. At least one court has indicated that a party’s financial hardship may be one such circumstance that makes imposition of sanctions unjust. See *Bosworth v. Record Data of Md., Inc.*, 102 F.R.D. 518, 521 (D. Md. 1984).

47. 989 F.2d 1154 (11th Cir. 1993).

48. *Id.* at 1162.

conclusion, combined with the legislative intent to remove any "bad faith" requirement previously read into Rule 37, vests a trial court with broad discretion to impose monetary sanctions upon attorneys subject only to limited due process protection.<sup>49</sup>

*C. Limitations on Sanctions Imposed Under Rule 37(b)*

While it is apparent that district courts are given wide discretion in formulating appropriate sanctions, there are general limitations upon that discretion. First, the district courts must provide the sanctioned party or attorney with adequate due process. Secondly, and in furtherance of the general due process considerations, the sanctions imposed must specifically relate to the claimed discovery abuse. Courts of appeal use an abuse of discretion standard to review the district court's sanction order. Thus, as long as there are adequate judicial findings supporting the consideration of these limitations, it appears that the district court's reasonable sanctions will be upheld.<sup>50</sup>

Rule 37(b)(2) embodies two due process standards.<sup>51</sup> These "two standards, one general and one specific, . . . limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery."<sup>52</sup> While the latter requirement reflects the rule in *Hammond Packing Co. v. Arkansas*,<sup>53</sup> "the former represents [a] general [substantive] due process restriction on the court's discretion."<sup>54</sup>

The amount of sanctions a court can award is limited under Rule 37 only by that which is "reasonable" under the circumstances.<sup>55</sup> "The requirement that an ordered sanction be 'just' imposes a duty on the district court, particularly in the case of severe sanctions, to give adequate consideration to 'whether lesser sanctions would be more appropriate for the violation.'"<sup>56</sup> Thus, at least in the cases where dismissal is used as a sanction, lesser sanctions should be imposed if they would adequately compensate the aggrieved party and deter future discovery abuses.<sup>57</sup> For the same reasons, the district court should use the same

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49. *See id.*

50. *See id.* at 1160.

51. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

52. *Id.* at 707; *see also* *General Ins. Co. of Am. v. Eastern Consol. Util., Inc.*, 126 F.3d 215, 220 (3d Cir. 1997) (citing *Insurance Corp. of Ireland*, 456 U.S. at 707).

53. 212 U.S. 322 (1909).

54. *Insurance Corp. of Ireland*, 456 U.S. at 707.

55. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985).

56. *Webb v. District of Columbia*, 146 F.3d 964, 971 (D.C. Cir. 1998) (quoting *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996)).

57. *See Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997) (holding that a court should consider prejudice and availability of lesser sanctions before entering default or dismissal). This is the general rule for when the harshest sanction of dismissal

rationale to formulate all sanctions.

In addition to a substantive due process limitation, Rule 37 imposes a general procedural due process limitation. Procedural due process requires that a sanctioned attorney or party must have adequate notice and a chance to be heard.<sup>58</sup> There are several compelling reasons why notice, an opportunity to prepare a defense, and a hearing are required prior to sanctioning counsel or a litigant. The procedural due process requirement ensures that: (1) attorneys "have an opportunity to prepare a defense and to explain their questionable conduct at a hearing; (2) the judge [has] time to consider the severity and propriety of the proposed sanction in light of the attorney's explanation for their conduct; and (3) the facts supporting the sanction appear in the record, facilitating appellate review."<sup>59</sup>

The final due process requirement of Rule 37(b) is the specifically-related-to requirement. Under this requirement, a sanction must be specifically related to a particular "claim" of discovery abuse. This requirement is normally enunciated when a district court deems certain facts as admitted. Then, the admitted facts must be those contained in (specifically related to) the discovery order that was not obeyed.<sup>60</sup> This presumption originated in *Hammond Packing Co. v. Arkansas*.<sup>61</sup> In *Hammond Packing*, the Court dismissed a defense when the defendant failed to produce any evidence in support of a particular defense.<sup>62</sup> The Court reasoned that this failure supports "the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense."<sup>63</sup> In essence, the sanction takes as established the facts sought to be proven through discovery.<sup>64</sup> The fact that a "legal consequence . . . follows from this, does not in any way affect the appropriateness of the sanction."<sup>65</sup>

For the purposes of a meaningful review, a district court invoking the sanction power of Rule 37 must "clearly state its reasons so that meaningful

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will be imposed. However, the same theory should hold true for other sanctions, such as striking defenses and barring evidence from use at trial. Courts favor disposition on the merits and adequate deterrence, but must balance these preferences with the prejudice imposed on the aggrieved party. If lesser sanctions can adequately deter the noncomplying party while at the same time minimize the prejudice imposed on the aggrieved party, it makes sense to impose the lesser sanctions so that the matter can be fully and fairly litigated.

58. "[L]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522 (9th Cir. 1983) (quoting *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 767 (1980)).

59. *Id.* at 522-23 (citing *Weiss v. Burr*, 484 F.2d 973, 985-87 (9th Cir. 1973)).

60. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707, 709 (1982).

61. 212 U.S. 322 (1909).

62. *See id.* at 357.

63. *Id.*

64. *See Insurance Corp. of Ireland*, 456 U.S. at 709.

65. *Id.*



review may be had on appeal.”<sup>66</sup> As previously mentioned, an appellate court reviews sanctions imposed under Rule 37 under an abuse of discretion standard.<sup>67</sup> “The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [dismissed the action]; it is whether the District Court abused its discretion in so doing.”<sup>68</sup> Without detailed findings for each specific sanction, the appellate court does not have any basis for determining whether the district court abused its discretion and conformed with due process requirements.<sup>69</sup>

*D. Attorneys May Be Treated Differently than Parties*

An attorney who is delaying, stonewalling, or engaging in other abusive discovery behavior does so at his or her own peril. Specifically, attorneys should be aware that, in some instances, monetary sanctions will be imposed upon them under a much less stringent set of standards. At least one court has concluded that monetary sanctions should be imposed against attorneys before more severe sanctions are utilized.<sup>70</sup> These less stringent standards developed as a matter of fairness.<sup>71</sup> Specifically, abusive attorneys should be sanctioned before the parties themselves, especially when the attorney has knowingly engaged in abusive behavior.<sup>72</sup> It would be unfair to visit the sins of an attorney upon his client, and such a sanction assures the efficient administration of justice.<sup>73</sup>

The last paragraph of Rule 37(b) makes it clear that sanctions may include an assessment of financial penalties directly against those counsel who are

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66. *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 505 (4th Cir. 1977) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 376 (1977)); *see also* *Metrocorps, Inc. v. Eastern Mass. Junior Drum & Bugle Corps Ass'n*, 912 F.2d 1 (1st Cir. 1990) (remanding for failure to state basis for denial of attorneys fees and costs); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985) (imposing \$10,000 sanction for bad faith discovery tactics and remanding for failure to state basis for imposing sanction).

67. *See Insurance Corp. of Ireland*, 456 U.S. at 700.

68. *Id.* at 707 (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)).

69. *See Wilson*, 561 F.2d at 505.

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We believe that imposing a monetary penalty on counsel is an appropriate sanction considerably less severe than holding counsel in contempt, referring the incident to the client or bar association, or dismissing the case. If we were to foreclose the district court from imposing this relatively mild penalty for violation of the local rules, district courts would be forced to resort to more severe sanctions.

*Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 520-21 (9th Cir. 1983) (citing *Chisom v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1331-32 (9th Cir. 1981)).

71. *See id.* at 521.

72. *See J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357 (D. Conn. 1981) (citing *Flaksa v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)).

73. *See id.*

responsible for the failure.<sup>74</sup> Because Rule 37 sanctions are intended both to punish and deter, as well as to compensate victimized parties, Rule 37(b) gives a district court the authority to levy monetary fines payable to the court against delinquent counsel.<sup>75</sup> In accordance with the clear language of Rule 37(b), a court has the authority to assess fines against counsel for violations of orders that the court has entered pursuant to Rule 26(f), as well as violations of any orders that the court has entered pursuant to Rule 37(a).<sup>76</sup>

## II. CIVIL CONTEMPT VERSUS CRIMINAL CONTEMPT

The problems surrounding non-compensatory monetary sanctions begin with the distinction between criminal contempt and civil contempt. The confusion surrounding the contempt distinction is so great that one commentator has stated that "[t]he literature on contempt of court is unanimous on only one point: the law is a mess."<sup>77</sup> Nevertheless, for courts that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions, the distinction is an important one.

The importance of the civil/criminal distinction revolves around general notions of due process, specifically those rights given to a defendant in a criminal action. "The distinction between criminal and civil contempt is important because '[c]riminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.'"<sup>78</sup>

The distinction between civil and criminal contempt "turns on 'the character . . . of the sanction' imposed."<sup>79</sup> Succinctly, "[c]ivil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance."<sup>80</sup> On the other hand, a contempt sanction is generally considered criminal if it imposes punishment for past conduct, usually imprisonment or a fine in a fixed amount.<sup>81</sup> While these distinctions are general, they provide insight into many

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74. Courts have also relied on their inherent powers to impose monetary sanctions upon attorneys. This power flows from the court's inherent power to control the cases before it. The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. See *Flaksa*, 389 F.2d at 888; see also *Cleminshaw*, 93 F.R.D. at 357-58.

75. See *Cleminshaw*, 93 F.R.D. at 359.

76. See *id.* at 359 n.16.

77. Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1025 (1993).

78. *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1438, 1442 (10th Cir. 1998) (quoting *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994)).

79. *International Union, United Mine Workers*, 512 U.S. at 827 (citation omitted).

80. *Law*, 134 F.3d at 1442 (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)).

81. See *Hicks v. Feiock*, 485 U.S. 624, 631-33 (1988).

of the courts rulings that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions.

### III. THE CLASSIFICATION CONFUSION: DISTRICT AND CIRCUIT COURT TREATMENT OF NON-COMPENSATORY MONETARY SANCTIONS

As a result of the confusion and judicial discretion surrounding sanctions under Rule 37(b), a split in the circuit courts has developed. The circuit courts are split as to whether non-compensatory monetary sanctions may be imposed without a finding of contempt.<sup>82</sup> In effect, the split seems to be the result of a classification problem. The courts requiring a finding of contempt classify non-compensatory monetary sanctions as fines with criminal overtones,<sup>83</sup> whereas the courts that do not require the finding classify non-compensatory sanctions as appropriate civil sanctions furthering judicial economy and control.<sup>84</sup>

In the end, a court must choose between additional due process or judicial economy and control. If the court favors additional due process beyond that found in Rule 37, requiring a finding of contempt will ensure more procedural protection to sanctioned parties.<sup>85</sup> However, if the court favors judicial economy and control, relying on the procedural protections Rule 37 provides will allow a speedier trial, a more direct focus on the merits of the case, and more control over the case before it.<sup>86</sup>

#### A. Courts Requiring a Finding of Contempt

The circuit and district courts that have required a finding of contempt favor additional procedural protections. These courts have used two rationales to arrive at the contempt requirement for imposing non-compensatory sanctions. First, courts have generally classified non-compensatory monetary sanctions as punitive fines equal to criminal contempt and have ignored the express language of Rule 37.<sup>87</sup> As a result of this classification, the courts have required the additional due process protections afforded to criminal defendants.<sup>88</sup> The second rationale used to arrive at a finding of contempt has focused on a seemingly narrow reading of the last paragraph of Rule 37(b)(2)<sup>89</sup> and has limited any

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82. See *Law*, 134 F.3d at 1442 (citing *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5 (2d Cir. 1996)).

83. See, e.g., *id.* at 1443.

84. See, e.g., *Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 338 (D. Conn. 1981).

85. See *Law*, 134 F.3d at 1443-44.

86. See *Cleminshaw*, 93 F.R.D. at 351 n.11.

87. See, e.g., *Law*, 134 F.3d at 1442.

88. See *id.* at 1444.

89. The final paragraph of Rule 37(b)(2) states:

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an

monetary sanctions to compensatory fees and expenses.<sup>90</sup> Under this rationale, any amount of monetary sanctions in excess of "reasonable expenses" is an unauthorized fine under Rule 37 unless there has been an associated finding of contempt.<sup>91</sup>

The best example of the typical contempt-requiring case is *Law v. National Collegiate Athletic Ass'n*,<sup>92</sup> which is the most recent case addressing the issue.<sup>93</sup> The dispute in *Law* arose out of an alleged violation of federal antitrust law by the National Collegiate Athletic Association ("NCAA"). The defendant and defense counsel were sanctioned by the district court for failing to provide specific salary and benefit information of various Division I coaches to the plaintiff.<sup>94</sup> As a result of the defense's failure to provide the ordered information, the district court ordered the NCAA and its counsel to pay the reasonable expenses and attorney's fees that plaintiff incurred because the failure to permit discovery, plus a twenty-five percent surcharge.<sup>95</sup>

The district court imposed the twenty-five percent surcharge in excess of the reasonable fees and expenses to deter future discovery abuse. The district court stated that no meaningful deterrent effect would result without the surcharge.<sup>96</sup> The district court judge pointed out that the NCAA was already subject to liability for payment of all costs and fees which plaintiff incurred due to the NCAA's established violation of federal antitrust law and that the surcharge was the least severe penalty that would serve to deter future misconduct.<sup>97</sup>

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award of expenses unjust.

FED. R. CIV. P. 37(b)(2).

90. See, e.g., *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995); *Buffington v. Baltimore County, Md.*, 913 F.2d 113 (4th Cir. 1990).

91. It is significant that none of these contempt-requiring courts have addressed the constitutionality of Rule 37. Instead of addressing the clear language of Rule 37, courts have narrowly read Rule 37 to avoid questioning the constitutionality of the Rule. It would seem logical that if the plain language of Rule 37 allowed non-compensatory monetary sanctions, but non-compensatory monetary sanctions are unconstitutional because of the procedure provided by Rule 37, then Rule 37 is unconstitutional. This is a tough conclusion for any court to accept.

92. 134 F.3d 1438 (10th Cir. 1998).

93. Other cases which discuss a finding of contempt are: *Satcorp International Group v. China National Silk Import & Export Corp.*, 101 F.3d 3 (2d Cir. 1996) (did not answer whether a finding of contempt is necessary before imposing non-compensatory sanctions, but held that, at the least, due process requires that the delinquent party be provided with notice of possible sanctions and an opportunity to present evidence or arguments against their imposition); *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) (any amount of monetary sanctions in excess of compensatory damages requires a finding of contempt); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36 (4th Cir. 1995) (a fine under Rule 37 is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard).

94. See *Law*, 134 F.3d at 1439-40.

95. See *id.* at 1440.

96. See *id.* at 1441.

97. See *id.* The district court apparently saw a potential problem with a narrow reading of

The Tenth Circuit disagreed with the district court and overturned the district court's surcharge sanction. The court ignored the plaintiff's argument that the "may make such orders in regard to the failure as are just" language of Rule 37(b)(2) allows sanctions in excess of reasonable attorney's fees and expenses. Instead, the Tenth Circuit focused on the civil and criminal contempt distinction. The Tenth Circuit equated the twenty-five percent surcharge to a finding of criminal contempt and held that the sanctioned parties, client, and attorneys, did not receive adequate due process.<sup>98</sup>

In making the civil and criminal contempt distinction, the Tenth Circuit relied on general notions of civil and criminal contempt set forth by the Supreme Court.<sup>99</sup> The court did not equate the non-compensatory sanction (the surcharge) to a finding of civil contempt because it was not meant to compensate the aggrieved party and because the defendant and its counsel could not have avoided the sanction by complying with the order.<sup>100</sup>

Once the Tenth Circuit equated the surcharge to a finding of criminal contempt, the court had to determine whether the procedural safeguards for criminal contempt orders were satisfied. These procedural safeguards are:

[D]efendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves; must be advised of charges,

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Rule 37 limiting monetary sanctions to compensatory damages. If a remedy for a cause of action provides for attorney's fees upon successful completion, then limiting the Rule 37 sanctions to those expenses and fees only resulting from the discovery abuse does not serve any deterrent effect because the defendant will have to pay those fees whether the case is won or lost. *See id.* Due to the resulting lack of specific punishment, others will be more likely inclined to engage in similar abusive behavior. *See id.*

The *Law* court responded to this argument by stating that this outcome is not inevitable because, if the defendant won on appeal, the defendant would only have to pay those expenses and fees associated with the discovery abuse rather than all of the attorney's fees and expenses incurred by plaintiff over the course of the antitrust case. *See id.* at 1441 n.7.

However, in cases like antitrust, a defendant is left in a position where compensatory discovery sanctions are very small compared to the large amounts of money at stake in the overall case (which already includes the adversary's attorney's fees and expenses). In effect, the cost of doing wrong is reduced and may even become profitable. The worst possible position for the defendant is losing and having to pay the judgment and all plaintiff incurred expenses and fees. However, should the discovery abuse provide a winning edge for the defendant, it must only pay those expenses and fees incurred as a result of the discovery abuse (which is almost nothing compared to the potential payout had the defendant lost).

98. *See id.* at 1443.

99. *See id.* at 1442 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949) (civil contempt is a sanction to enforce compliance with an order of the court or to compensate for losses sustained); *United States v. United Mine Workers*, 330 U.S. 258 (1947) (civil contempt is a fine payable to the complainant to compensate her for losses sustained)).

100. *See id.*

have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses; must be given a public trial before an unbiased judge; and must be afforded a jury trial for serious contempts.<sup>101</sup>

Furthermore, Federal Rule of Criminal Procedure 42(b) provides that “[a] criminal contempt . . . shall be prosecuted on notice . . . [which shall] state . . . the essential facts constituting the criminal contempt charged and describe it as such.”<sup>102</sup>

In *Law*, the court found that the additional due process concerns and safeguards associated with criminal contempt were not met. Specifically, the court found that the defendant and its defense counsel did not receive adequate notice of the possibility that they might be held in criminal contempt, because: (1) the request for sanctions did not request monetary sanctions in excess of attorney’s fees and expenses; and (2) the district court’s show cause order did not specifically name two of defendant’s counsel.<sup>103</sup> Accordingly, the district court’s sanctions were vacated.

The *Law* case is typical of the cases that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions. This line of cases typically classifies non-compensatory monetary sanctions as criminal fines which are subsequently equated to findings of criminal contempt.<sup>104</sup> Once a court decides the sanction was non-compensatory, it must ensure that all of the procedural safeguards for criminal proceedings have been satisfied before it will uphold the sanctions. Normally, courts in this position will find that the desired procedural safeguards were not satisfied during the course of regular litigation, and the abusive discovery goes unpunished.<sup>105</sup>

While the court in *Law* focused on the civil versus criminal contempt distinction to overturn the sanctions, a narrow reading of Rule 37 is implicit in the court’s holding. By equating sanctions in excess of fees and expenses to a punitive fine, the court ignored the “may make such orders in regard to the failure as are just” language of Rule 37(b)(2), which grants it broad discretionary power to formulate appropriate sanctions. The same implicit narrow reading of Rule 37

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101. *Id.* at 1443-44.

102. *Id.* at 1444 (quoting FED. R. CRIM. P. 42(b)).

103. *See id.*

104. *See generally* Satcorp Int’l Group v. China Nat’l Silk Import & Export Corp., 101 F.3d 3 (2d Cir. 1996) (did not answer whether a finding of contempt is necessary before imposing non-compensatory sanctions, but held that, at the least, due process requires that the delinquent party be provided with notice of possible sanctions and an opportunity to present evidence or arguments against their imposition); *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995) (any amount of monetary sanctions in excess of compensatory damages requires a finding of contempt); *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995) (a fine under Rule 37 is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard).

105. *See, e.g., id.*; *Hathcock v. Navistar Int’l Transp. Corp.*, 53 F.3d 36 (4th Cir. 1995); *Buffington v. Baltimore County, Md.*, 913 F.2d 113 (4th Cir. 1990).



holds true in other courts' holdings that require a finding of contempt prior to imposing non-compensatory monetary sanctions.

Another case that required a finding of contempt prior to imposing non-compensatory sanctions is *Martin v. Brown*.<sup>106</sup> Unlike the court in *Law*, the court in *Martin* found adequate due process. However, the court did require a finding of contempt.

In *Martin*, the Third Circuit overturned a five hundred dollar sanction imposed by the district court upon the defense counsel because the basis for the sanction was not specifically set forth by the district court. Unlike most courts that require a finding of contempt prior to the imposition of non-compensatory monetary sanctions, the court in *Martin* found adequate due process without the additional proceedings associated with criminal contempt.<sup>107</sup> In *Martin*, the plaintiff sought to inspect the defendant's real property involved in the litigation. The court issued an order allowing the inspection, but the defendant continually refused to allow plaintiff to inspect the property. In response to the refusal, the plaintiff filed a Motion for Sanctions, and the court issued an order directing the parties to comply with the previous discovery order and even warned them that sanctions would be imposed for future noncompliance. Despite this warning, the defendant refused to allow inspection of the real property and the plaintiff filed yet another Motion for Sanctions. The court, once again in a later pretrial hearing, "echoed its warning to the parties . . . that sanctions [w]ould be imposed for conduct . . . 'in violation of the Rules of Civil Procedure and/or the Rules of Professional Conduct.'"<sup>108</sup>

Defense counsel claimed that she did not receive adequate due process. Specifically, defense counsel claimed that she did not receive sufficient notice that specific Rule 37 sanctions would be imposed.<sup>109</sup> The court disagreed. The court recognized that "[n]o precise all encompassing rule captures the requirements of procedural due process. The process that is due varies with the nature of particular disputes, and evaluation of its requirements should balance

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106. 63 F.3d 1252 (3d Cir. 1995).

107. While the court did find adequate due process, it appears that it did so under the wrong standard of review. In *Martin*, the Third Circuit recognized that the sanction involved issues of due process and substituted plenary review for the abuse of discretion standard. See *id.* at 1262. The court stated that "[w]hen the procedure the district court uses in imposing sanctions raises due process issues of fair notice and the right to be heard, however, our review is plenary." *Id.* However, it is evident that imposing any sanctions under Rule 37 deals in some degree with issues of notice and opportunity to be heard. This alone should not be the basis for establishing the standard of review. Furthermore, it is well-settled law that appellate courts are required to review Rule 37 sanctions under an abuse of discretion standard. See *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *General Ins. v. Eastern Consol. Util.*, 126 F.3d 215, 219 (1997). Thus, the Third Circuit should have provided a more detailed explanation supporting its deviation from the established standard of review set forth by the Supreme Court.

108. *Martin*, 63 F.3d at 1256.

109. See *id.* at 1262.

fairly the competing interests of the sanctioned person against the judicial system's need for efficient judicial administration."<sup>110</sup> The court held that plaintiff's motion requesting Rule 37 sanctions for noncompliance with the court's discovery order placed defense counsel on notice that sanctions would be imposed under Rule 37.<sup>111</sup> That the specific sanctions requested were not those given was immaterial in the court's eyes.<sup>112</sup> As further evidence that defense counsel was on notice of potential Rule 37 sanctions, the court pointed out that defense counsel even filed a response to plaintiff's Rule 37 sanctions motion.<sup>113</sup>

The court similarly disagreed with defense counsel's assertion that she did not receive an adequate opportunity to be heard. Defense counsel claimed that she did not receive an adequate opportunity to be heard because she was not able to attend the hearing for unresolved issues, where the sanctions were discussed, due to a prior commitment. The court held that defense counsel's election to rely on local counsel to state her position was immaterial.<sup>114</sup>

While the Third Circuit in *Martin* did not overturn the sanction imposed upon the attorney for procedural reasons, it did overturn the imposed sanctions on grounds that the sanction imposed was overly broad (i.e., the district court did not explain the specific basis for the sanction). Specifically, the court held that "[a]bsent contempt, the only monetary sanctions Rule 37 authorizes are 'reasonable expenses' resulting from the failure to comply with discovery."<sup>115</sup> Because the five hundred dollar sanction was in excess of the "reasonable expenses" set forth in Rule 37 and there was not any associated finding of contempt to justify the sanction, the court deemed the sanction to be a fine, which was not authorized by Rule 37.<sup>116</sup> Because the sanction was not considered authorized under Rule 37 and the district court did not provide any other specific basis for the sanction, the Third Circuit overturned the sanction.<sup>117</sup>

Like *Law*, a narrow reading of Rule 37 is implicit in the *Martin* court's holding. In *Martin*, the court also ignored the "may make such orders in regard to the failure as are just" language of Rule 37(b)(2). It did, however, rely on the last paragraph of Rule 37(b)(2) to conclude that Rule 37 limits monetary sanctions to reasonable expenses.<sup>118</sup> This paragraph states: "In lieu of any of the

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110. *Id.*

111. *See id.* at 1263.

112. *See id.*

113. *See id.*

114. *See id.*

115. *Id.* (citing FED. R. CIV. P. 37 (1995); *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1126 (3d Cir. 1990)).

116. *Id.*

117. *See id.* at 1264. Significantly, the court recognized that Rule 37 authorizes punitive and compensatory damages, but limited the amount of those damages by relying on case law that requires the amount of monetary damages be *specifically related* to those expenses, not *equal* to those expenses. *See id.* at 1263 n.15 (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980)).

118. *See id.* at 1263.

foregoing orders or in addition thereto, the court shall require the party failing to obey . . . to pay the reasonable expenses."<sup>119</sup> By concluding that Rule 37 only allows reasonable expenses, the court seemingly transformed the last paragraph of Rule 37(b)(2) into an impenetrable ceiling or cap on monetary sanctions.

*Law* and *Martin* are examples of cases that use different means to come to the same end. Both of these courts classified non-compensatory monetary sanctions as fines. The court in *Law*, however, went even further and classified non-compensatory monetary sanctions as a criminal fine. Under the rationale used by this court, any non-compensatory sanctions intended to punish are equated to criminal contempt, and the sanctioned party must be afforded the additional due process safeguards associated with criminal proceedings. Under the reading of Rule 37 in *Martin*, even if there is adequate due process, a finding of contempt is still required to justify any monetary sanctions in excess of the "reasonable expenses" mentioned in of Rule 37(b)(2). Regardless of the rationale used, a finding of contempt is ultimately required by both courts before non-compensatory monetary sanctions are allowed.

### *B. Courts Not Requiring a Finding of Contempt*

On the opposite side of the spectrum from *Law* and *Martin* are courts that do not require a finding of contempt before allowing non-compensatory monetary sanctions. These courts have placed a premium on judicial economy and control while still recognizing the importance of adequate due process.<sup>120</sup> Courts that allow non-compensatory monetary sanctions have had a much broader reading of Rule 37 than those that require a finding of contempt and have pointed to the federal court's inherent power to control the proceedings before them as additional support for imposing those sanctions. By allowing non-compensatory monetary sanctions these courts hope to punish those who perform egregious discovery abuses and deter others from engaging in similar conduct. As a result, the judicial process will become smoother and speedier without endless mini-

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119. FED. R. CIV. P. 37(b)(2).

120. See, e.g., *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 360 (D. Conn. 1981). The court held that:

[L]itigants, the public, and the courts share an interest in the prompt and efficient administration of justice; that failures of counsel to comply with applicable discovery rules and court orders threaten that common interest; and that reasonable sanctions, carefully and consistently applied, are an appropriate means of deterring further violations and vindicating the public interest.

*Id.* See also *Pereira v. Narragansett Fishing Corp.*, 135 F.R.D. 24, 27 (D. Mass. 1991). The court stated:

In my opinion, the Court's ability to manage civil litigation in even the most elementary fashion requires that the conduct forming the basis of the violations in this case be dealt with in a manner which will deter counsel for the plaintiff in this case and other counsel in other cases from behaving similarly in the future.

*Id.*

trials, which cause unwarranted delay to and distraction from the cases before the federal courts.<sup>121</sup>

The leading case allowing non-compensatory monetary sanctions without a finding of contempt is *J.M. Clemminshaw Co. v. City of Norwich*.<sup>122</sup> In *Clemminshaw*, the court approached the problem using a broad reading of Rule 37 and relied upon the inherent power of the federal courts to ultimately conclude that non-compensatory monetary sanctions are permissible.<sup>123</sup> The court also concluded that the process set forth in Rule 37 adequately addressed any due process considerations.<sup>124</sup>

In *Clemminshaw*, the court sanctioned an attorney for failing to answer discovery requests. The court opined that the failure to answer was the fault of counsel and, as a consequence, counsel should compensate for the reasonable expenses incurred by the opposing party, including paying a fine to punish counsel for his abusive conduct.<sup>125</sup> Accordingly, the court assessed a fine upon counsel in the amount of \$150.

The court first relied on Rule 37 as an adequate basis for imposing the \$150 sanction upon counsel. The district court judge applied a "broad" interpretation of Rule 37, which focused on the "may make such orders . . . as are just" language of subparagraph (b)(2).<sup>126</sup> The court recognized that the sanctions listed in Rule 37 were not intended to be exhaustive and that the "as are just" language suggested that a court possesses discretionary authority to fashion any appropriate order to enforce compliance with pre-trial discovery.<sup>127</sup> The court later supported its position that these sanctions could be punitive, and in excess of compensating the other party, by relying on the language used in the last paragraph of Rule 37(b) and on the goals of the rule.

[T]he last paragraph of Rule 37(b) makes clear that such sanctions may include an assessment of financial penalties directly against those counsel who are responsible for the failure of compliance. Because Rule 37 sanctions are intended to serve punitive and deterrent functions, as well as the goal of compensating victimized parties, the court has found that under Rule 37(b), it possesses the authority to levy against

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121. See *Clemminshaw*, 93 F.R.D. at 359 ("The judiciary's use of case and court management techniques can help speed the termination of civil actions without impairing the quality of justice.").

122. *Id.* at 338.

123. See *id.* at 351-54.

124. See *id.* at 351 n.11.

125. See *id.* at 356-57.

126. *Id.* at 355.

127. *Id.* (citing *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974)). One could argue that the "enforce compliance with pre-trial discovery" language cited by the court could be equated to the coercive function of civil contempt. However, a full reading of the court's opinion regarding the general and specific deterrence goals of Rule 37 seems to suggest that the court meant compliance with the federal discovery process in general, by the parties currently before the court and those who would come before it in the future.

delinquent counsel monetary fines which are payable to the court. In accordance with the clear language of Rule 37(b), the court finds that its authority to assess fines against counsel extends to violations of orders which the court has entered pursuant to Rule 26(f), as well as to violations of any orders which the court has entered pursuant to Rule 37(a).<sup>128</sup>

In addition to Rule 37, the court found additional support for non-compensatory monetary sanctions under the federal court's inherent power. The court recognized that a federal court has the inherent power to "manage its affairs."<sup>129</sup> This power includes the ability of a trial court to impose "reasonable and appropriate sanctions upon errant lawyers practicing before it."<sup>130</sup> These statements indicate that, "in an era of rapidly expanding dockets, district courts must be permitted to draw on the full range of their inherent powers, and on the sanctions authorized by [the Federal Rules of Civil Procedure], to avoid undue delays in the disposition of cases."<sup>131</sup>

The *Cleminshaw* court also gave several other reasons non-compensatory sanctions are permissible. The court recognized the unfairness of visiting the sins of an attorney upon his/her client and the need for such a sanction to assure the efficient administration of justice.<sup>132</sup> It also recognized that non-compensatory sanctions were consistent with the intent of the 1970 Amendments to Rule 37, which strove to create greater flexibility of the rules to handle the increase in discovery abuses.<sup>133</sup> Finally, the court held that the imposition of non-compensatory monetary sanctions furthers the punishment and deterrence goals of Rule 37.<sup>134</sup>

Not only did the court find authorization for non-compensatory monetary sanctions, it also distinguished them from a criminal fine.<sup>135</sup> While other courts have equated fines to criminal contempt because they carry the criminal hallmark of punishment,<sup>136</sup> the *Cleminshaw* court did not find the argument convincing. The court stated that there is a punitive and deterrent element in all discovery sanctions.<sup>137</sup> The court concluded that additional due process associated with a

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128. *Id.* at 358 n.16.

129. *Id.* at 357 (citing *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976)).

130. *Id.* at 353 (quoting *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir. 1968)).

131. *Id.* at 358.

132. *See id.* at 357.

133. *See id.* at 356.

134. *See id.* at 360.

135. *See id.* at 351 n.11.

136. *See supra* Part III.A.

137. "[A]lthough the most drastic sanctions may not be imposed as "mere penalties," courts are free to consider the general deterrent effect their orders have on the instant case and on other litigation, provided that the party on whom they are imposed is, in some sense, at fault." *Cleminshaw*, 93 F.R.D. at 351 n.11 (quoting *Cine Forty-Second St. Theater Corp. v. Allied Artists*

finding of criminal contempt was not necessary. The court opined that:

The recognition of this punitive element has not, in general, led to the requirement that courts establish additional procedures before imposing discovery sanctions. To the contrary, recent cases and commentary suggest the wisdom of the district courts' drawing even more promptly and diligently on their authority to sanction for discovery abuses.<sup>138</sup>

The court went on to analogize non-compensatory monetary sanctions to other instances where punitive sanctions have been imposed "directly upon counsel without procedural protections beyond those of notice and an opportunity to be heard."<sup>139</sup> For instance, Federal Rule of Appellate Procedure 38 provides that an appellate court may, in its discretion, impose "just damages" for delay and "single or double costs to the appellee."<sup>140</sup> Similarly, 28 U.S.C. § 1912 provides, "[w]here a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs."<sup>141</sup>

Double costs, by definition, exceed [any] amount of [damages that would] compensate appellees for [their] expenses in opposing a frivolous appeal. To the extent that the court awards double costs, therefore, the sanction imposed on the appellants, or their counsel, is necessarily punitive and thus designed to serve as a deterrent.<sup>142</sup>

Additionally, the court also analogized non-compensatory monetary sanctions to sanctions imposed under 28 U.S.C. § 1927.<sup>143</sup> The court observed that, under § 1927, the Second Circuit Court of Appeals has, with some frequency, imposed substantial sanctions directly against counsel without first conducting special hearings on the propriety of the sanctions.<sup>144</sup>

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Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979)).

138. *Id.* at 351 n.11 (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980)).

139. *Id.*

140. The full text of Rule 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

141. 18 U.S.C. § 1912 (1994).

142. *Cleminshaw*, 93 F.R.D. at 351 n.11.

143. *See id.* "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927.

144. *See Bankers Trust Co. v. Publicker Indus., Inc.*, 641 F.2d 1361, 1368 (2d Cir. 1981) (allowing double costs and either damages of \$10,000 or attorneys' fees and expenses, whichever sum was less, assessed jointly against appellant and its counsel); *Browning Debenture Holders' Comm. v. DASA Corp.*, 605 F.2d 35, 40-41 (2d Cir. 1978) (allowing double costs and damages of \$2500 assessed against appellants' counsel); *Acevedo v. Immigration and Naturalization Serv.*, 538



Other cases in various circuits and districts have also found non-compensatory monetary sanctions to be appropriate.<sup>145</sup> Like *Cleminshaw*, these cases have focused on the express language of Rule 37 and the court's inherent power to manage its affairs as appropriate bases for their conclusions. One of the most transparent analyses of Rule 37 as authority for non-compensatory monetary sanctions was set forth in *Pereira v. Narragansett Fishing Corp.*<sup>146</sup> In *Pereira*, the court relied on the clear language of Rule 37.

The clear import of this language is that the phrase 'may make such orders as are just' as used in both Rules 16(f) and 37(b)(2), Fed. R. Civ. P., permit the imposition of a sanction in the form of a monetary fine which is paid to the court and not to an opposing party as reimbursement for costs and attorney's fees. The language also seems to make clear that this sanction can be imposed without proceeding to a finding of contempt as per Rule 37(b)(2)(D), Fed. R. Civ. P. The power to proceed by way of contempt is explicit; if this were the only route, there would have been no need for the First Circuit to construe the phrase "such orders as are just" to include the imposition of a monetary sanction. That a finding of contempt is not a prerequisite to the imposition of such a monetary sanction is made clear also by the First Circuit's notation in the *Media Duplication* case that "[t]he relevant portions of Rule 37 do not pertain to monetary sanctions (except to the extent that 37(b)(2)(D) permits an order treating the failure to obey the court as a form of contempt)."<sup>147</sup>

Due process is another important aspect of non-compensatory monetary sanctions examined by courts that do not require a finding of contempt. The court in *Cleminshaw* was not the only court to conclude that the process set forth by Rule 37 adequately addresses any due process problems. For example, the

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F.2d 918, 921 (2d Cir. 1976) (allowing double costs assessed against petitioner's counsel); *Cleminshaw*, 93 F.R.D. at 351 n.11 (citing *Shuffman v. Hartford Textile Corp.*, 659 F.2d 299, 305 (2d Cir. 1981) (allowing double costs and damages of \$5000 assessed against counsel)).

145. See *Roadway Express v. Piper Aircraft Corp.*, 447 U.S. 752, 765 (1980) (concluding that the inherent power of federal courts includes the authority to "levy sanctions in response to abusive litigation practices"); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) (federal trial court possesses inherent power to control the disposition of the cases before it); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985) (Rule 37(b) and the inherent power of the court authorize such sanctions); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 520 (9th Cir. 1983) (district court has the inherent power to impose reasonable and appropriate sanctions upon those admitted to the bar); *Flaksa v. Little River Marine Const. Co.*, 389 F.2d 885, 888 (5th Cir. 1968) (stating that "[t]he inherent power of the court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.").

146. 135 F.R.D. 24 (D. Mass. 1991).

147. *Id.* at 27 (quoting *Media Duplication Serv., Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1241 n.11 (1st Cir. 1991)).

court in *Carlucci v. Piper Aircraft Corp.*,<sup>148</sup> interpreted Supreme Court cases to stand for the proposition that "the power of federal courts to curb [discovery] abuses . . . not to be hamstrung by the additional procedural burdens [if those burdens] would have the effect of limiting the force and effect of Federal Rule 37."<sup>149</sup> The court recognized that if Rule 37 was not enforced diligently, its punishment and deterrence goals would be eroded.<sup>150</sup> In concluding that Rule 37 itself provides adequate due process, the court stated: "It is neither necessary nor appropriate for an inferior federal court to engraft upon Rule 37 a procedural mechanism more demanding than that which the Supreme Court has deemed adequate to both guarantee due process and vindicate the policy underlying that rule."<sup>151</sup>

While several cases have concluded that Rule 37 authorizes non-compensatory monetary sanctions and that the process provided for in the rule is adequate, it should be noted that in most of these cases, the sanctioned individuals have been attorneys. This distinction played an important role in *Miranda v. Southern Pacific Transportation Co.*,<sup>152</sup> where the court actually differentiated between contempt and the power of the court to sanction attorneys. It recognized that the bar bears a special administrative responsibility in the judicial process independent from the public at large.<sup>153</sup> "A monetary sanction imposed for failure to carry out this special responsibility . . . differs from the more severe infractions of criminal contempt for which attorneys and . . . the general public can become liable. The former is an unjustified failure to carry out an administrative responsibility as an officer of the court; the latter is an affront to the authority of the judge."<sup>154</sup>

Whether a court ultimately requires a finding of contempt depends on its classification of non-compensatory monetary sanctions. Courts that classify non-compensatory monetary sanctions as fines with criminal overtones will most likely require a finding of contempt, whereas courts that classify non-compensatory sanctions as appropriate civil sanctions allowed under Rule 37 or

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148. 775 F.2d 1440 (11th Cir. 1985).

149. *Id.* at 1450 (citing *Roadway Express*, 447 U.S. at 763-64; *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Link*, 370 U.S. at 632)).

150. *See id.*

151. *Id.*

152. 710 F.2d 516 (9th Cir. 1983).

153. The court also made a distinction between the word "fine" and "monetary sanction."

Because the term "fine" is generally associated in common parlance with criminal offenses we utilize the term "monetary sanction" to avoid this connotation. Numerous sanctions can be imposed against the parties and attorneys for violation of court rules. We see no reason to preclude the use of reasonable monetary sanctions against attorneys for violations of local rules when they are the offending parties. This may well be more appropriate on many occasions rather than penalizing the parties for the failures of their counsel.

*Id.* at 521.

154. *Id.*

the courts' inherent powers will most likely not require the finding. The current state of confusion surrounding these sanctions and the resulting split among the circuits demonstrate that this classification is not an easy one.

#### IV. MAKING SENSE OF THE CONFUSION: WHY NON-COMPENSATORY SANCTIONS ARE AUTHORIZED BY RULE 37

While the classification of non-compensatory monetary sanctions is not easy, there are several reasons why federal courts ought to conclude that these sanctions are allowable, especially when the party being sanctioned is an attorney. First, the express language of Rule 37 allows for sanctions not specifically enumerated in the rule. Second, the rationale behind non-compensatory monetary sanctions is fundamentally different from that of criminal contempt. Third, attorneys operate under different obligations than the public in general. Fourth, the process set forth by Rule 37 meets general due process requirements. Finally, such a finding is not only consistent with the general spirit of the Federal Rules of Civil Procedure, but it furthers the specific goals of Rule 37 more effectively than requiring a finding of contempt.

##### *A. The Express Language of Rule 37*

The express language of Rule 37 authorizes district courts to impose non-compensatory monetary sanctions. While some courts have limited monetary sanctions to reasonable costs and fees incurred by the aggrieved party,<sup>155</sup> the express language of Rule 37 gives wide discretion to a district court judge to impose any sanction it deems "just."

The plain language of Rule 37 makes it clear that as long as the imposed sanction is "just," the Federal Rules of Civil Procedure "place virtually no limits on judicial creativity."<sup>156</sup> Courts have made it clear that the sanctions listed in Rule 37(b) are not exhaustive of the sanctions available to district courts to punish discovery abuses.<sup>157</sup> Accordingly, the use of the word "just" would only limit the magnitude of any monetary sanctions to an amount which is "reasonable" under the circumstances.<sup>158</sup> "[While] the most drastic sanctions may not be imposed as 'mere penalties,' courts are free to consider the general deterrent effect their orders may have on the instant case and on other litigation, provided that the party on whom [the sanctions] are imposed is, in some sense, at fault."<sup>159</sup> Thus, Rule 37 authorizes judges to impose non-compensatory

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155. See *supra* Part III.A.

156. *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990).

157. See *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 194 (S.D.N.Y. 1995); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.P.R. 1994); *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 (1st Cir. 1990).

158. "The magnitude of sanctions awarded is bounded under Rule 37 only by that which is 'reasonable' in light of the circumstances." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985).

159. *Cine Forty-Second St. Theater Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062,

monetary sanctions as long as they are "reasonable" under the circumstances.

The clear language of Rule 37 empowers district court judges to impose any reasonable sanction. If the judge decides to impose non-compensatory monetary sanctions, it is not required to limit the amount of those sanctions to the reasonable expenses and fees incurred by the aggrieved party.

### *B. Fundamental Difference Between Civil and Criminal Contempt*

While non-compensatory monetary sanctions do punish, they should not be confused with a finding of criminal contempt. Non-compensatory monetary sanctions and criminal contempt are fundamentally different in several ways. These sanctions differ in requirements, alternative purposes, and consequences.

First, non-compensatory monetary sanctions have different requirements than a finding of criminal contempt. "Under the contempt statute, [a court must] find a willful disregard or disobedience of the court's authority."<sup>160</sup> In contrast, sanctions under Rule 37 are imposed when the court determines that the failure to comply with a discovery order was due to willfulness, bad faith or *any fault* of the person in noncompliance, but not inability.<sup>161</sup> Thus, non-compensatory monetary sanctions under Rule 37 differ from a finding of criminal contempt because a willfulness requirement is not required to impose Rule 37 sanctions.<sup>162</sup>

Furthermore, non-compensatory monetary sanctions under Rule 37 differ from a finding of criminal contempt because non-compensatory monetary sanctions serve purposes apart from mere punishment. To determine whether a court's imposition of sanctions constitutes impermissible punishment or permissible regulation, an appellate court must examine intent of the sanction and the statutory predicate.

Unless Congress in the statute and the court by its action expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on "whether an alternative purpose to which [the action] may rationally be connected is assignable first, and whether it appears excessive in relation to the alternative purpose assigned."<sup>163</sup>

In addition to punishment, non-compensatory monetary sanctions seek to deter future abusive conduct and to achieve judicial control and economy. One of the stated goals of Rule 37 is deterrence—both general and specific.<sup>164</sup> The punishment aspect of non-compensatory monetary sanctions accomplishes this

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1066 (2d Cir. 1979) (citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640) (1976)).

160. *In re Sutter*, 543 F.2d 1030, 1035 (2d Cir. 1976) (referring to 18 U.S.C. § 401).

161. *See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958).

162. *See supra* Part I.B.

163. *Harrell v. United States*, 117 F.R.D. 86, 88 (E.D.N.C. 1987) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

164. *See Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980).

goal.<sup>165</sup> Imposing non-compensatory monetary sanctions also furthers the goals of judicial economy and control. Imposing these sanctions helps achieve judicial economy by ridding cases of additional and unwarranted delays and distractions caused by conducting endless mini-trials.<sup>166</sup> Non-compensatory monetary sanctions also help achieve judicial control by curbing the number of abuses of conduct falling just short of criminal contempt.<sup>167</sup> Since non-compensatory monetary sanctions serve alternative goals such as deterrence, judicial economy, and judicial control, the fact that they punish does not make them impermissible as long as the punishment is not excessive.

The punishment achieved by non-compensatory monetary sanctions is seemingly not excessive in relation to its alternative purposes. Judicial economy, judicial control, and deterrence of discovery abuse are important goals.<sup>168</sup> In regards to judicial economy, it has even been said that courts have a positive duty to restrict needless relitigation of issues.<sup>169</sup> Imposing monetary sanctions in excess of reasonable fees and expenses furthers this important goal. Imposing additional sanctions in excess of compensatory expenses is, in some cases, the only way to accomplish these goals.<sup>170</sup> Should parties and attorneys not be adequately deterred, cases will not be effectively litigated and the already overcrowded federal dockets will become even more overcrowded.<sup>171</sup>

Furthermore, if parties attempt to stonewall discovery, requiring additional proceedings and a finding of contempt would only further the misguided cause.<sup>172</sup> Should a sanctioned party feel that a particular sanction was excessive, he or she may appeal the sanction. However, the question on appeal would be whether the district court abused its discretion in formulating the amount of the sanction.<sup>173</sup> Considering the goals of Rule 37 and their importance, the incidental punishment factor associated with non-compensatory monetary sanctions does not seem excessive.

Another important difference between non-compensatory monetary sanctions and criminal contempt is the consequences imposed. "The person found guilty of criminal contempt, unlike a person on whom sanctions have been imposed, now carries a criminal conviction on his record. Furthermore, possible

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165. See *id.*

166. See *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 359 (D. Conn 1981).

167. See *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985).

168. See *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996).

169. "In this era of overcrowded dockets the courts have a positive duty to restrict needless relitigation of issues." *Id.* at 453 (quoting *Gerrard v. Larsen*, 517 F.2d 1127, 1134 (8th Cir. 1975)).

170. See *supra* note 97.

171. See *generally Tyus*, 93 F.3d at 454-55.

172. See *supra* text accompanying note 91.

173. Appellate courts review "sanctions imposed by a district court for abuse of discretion and will not reverse absent a definite and firm conviction that the district court made a clear error of judgment." *In re the Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996) (quoting *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 379 (9th Cir. 1988)).

punishments for contempt, unlike sanctions, include imprisonment."<sup>174</sup>

Finally, at least in the cases of attorneys, non-compensatory sanctions carry an additional distinction from a finding of criminal contempt. Attorneys are frequently referred to as officers of the court.<sup>175</sup> A monetary sanction for failure to carry out this special responsibility as an attorney differs from the more severe infractions of criminal contempt (which may be imposed on attorneys and members of the general public).<sup>176</sup> The former is an unjustified failure to carry out an administrative responsibility as an officer of the court; the latter is an affront to the authority of the judge.<sup>177</sup>

### *C. Sanctioning Counsel Before the Parties*

In the case of attorneys, imposing non-compensatory monetary sanctions is more easily justified than imposing those sanctions against parties. The most significant justification for imposing non-compensatory monetary sanctions upon attorneys is a difference in obligations. Attorneys have special obligations which differ from those of the public in general.<sup>178</sup> Courts possess the inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal.<sup>179</sup> To accomplish this protection "[the] trial judge possesses the inherent power to discipline counsel for misconduct, short of behavior giving rise to disbarment or criminal censure, without [having to] resort to the powers of civil or criminal contempt."<sup>180</sup>

Yet another justification for treating attorneys different from the general public is the general notion of fairness. First, imposing a non-compensatory monetary sanction upon counsel may be the least severe, but most effective, available sanction. If district court judges were precluded "from imposing this relatively mild penalty for violation of the local rules, district courts would be forced to resort to more severe sanctions."<sup>181</sup> Also "imposing a monetary penalty on counsel is an appropriate sanction considerably less severe than holding counsel in contempt, referring the incident to the client or bar association, or dismissing the case."<sup>182</sup>

Non-compensatory monetary sanctions also result in fairer treatment of the

174. *Mackler Productions, Inc. v. Cohen*, 146 F.3d 126, 129 (2d Cir. 1998).

175. *See Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983).

176. *See id.*; *see also Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1450 (11th Cir. 1985) (citing *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980); *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962)).

177. *See Miranda*, 710 F.2d at 521.

178. *See id.* ("The bar bears a special administrative responsibility in the judicial process independent from the public at large.").

179. *See Roadway Express*, 447 U.S. at 764-65.

180. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1209 (11th Cir. 1985).

181. *Miranda*, 710 F.2d at 521.

182. *Id.*



parties. Courts have recognized the "unfairness of visiting the sins of an attorney upon his client," and thus "the need for a sanction in the nature of (an assessment against counsel)."<sup>183</sup>

In doing so, faultless parties rightfully remain unsanctioned and the individual committing the abuse is specifically punished.<sup>184</sup>

#### *D. Rule 37 Provides Adequate Due Process*

A significant problem surrounding non-compensatory monetary sanctions is due process. Some appellate courts have overturned these sanctions by concluding that the sanctioned individuals were not provided adequate due process.<sup>185</sup> However, at least in the case of attorneys, the due process provided for in Rule 37 seems to be adequate.

Rule 37 makes clear that if a party fails to obey a discovery order, the court may impose liability for incurred expenses unless failure is substantially justified.<sup>186</sup> Whatever amount of notice and opportunity to be heard this section affords may depend upon who is being sanctioned.<sup>187</sup> Every order entered by the court does not require notice and a preliminary hearing to avoid offending notions of due process.<sup>188</sup> "The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct."<sup>189</sup> Rule 37 makes clear that the court is at least *required* to award the opposing party reasonable fees and expenses in the event of a failure to obey a court order that is not substantially justified.<sup>190</sup> Rule 37 also makes clear that the district court may impose any order it deems just, including, but not limited to, those specifically listed in 37(b).<sup>191</sup>

"In view of the plain language . . . of Rule 37, any attorney who fails to comply with the requirements of Rule 37 may be deemed to understand the consequences of his [or her] conduct."<sup>192</sup> The Supreme Court has also

183. *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 357 (D. Conn. 1981) (quoting *In re Sutter*, 543 F.2d 1030, 1037 (2d Cir. 1976)).

184. *See id.*

185. *See supra* Part III.A.

186. *See* FED. R. CIV. P. 37(b); *supra* text accompanying notes 42-44.

187. *See* *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 767 n.14 (1980).

188. *See* *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962).

189. *Id.*

190.

The court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b).

191. "[T]he court . . . may make such orders . . . as are just." FED. R. CIV. P. 37(b)(2).

192. *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351 n.11 (D. Conn. 1981).

recognized that the assessment of a financial sanction against an attorney causes fewer due process concerns than does a sanction against his/her client.<sup>193</sup> Thus, the amount of notice and opportunity to be heard required for attorneys should be considerably less than that required for the parties to the litigation.

The amount of notice and opportunity to be heard also depends upon the severity of the imposed sanction. As with other sanctions, the nature of due process which is due before a sanction may be levied depends on the facts and the severity of the sanction.<sup>194</sup> An evidentiary hearing is required when a relatively substantial sanction is being considered or when there is a material issue of fact in dispute.<sup>195</sup> On the other hand, when the sanction being considered is relatively mild and there is no material issue of fact in dispute, due process only requires that the delinquent party be provided with notice that the possibility of sanctions will be imposed and an opportunity to present evidence or arguments against their imposition.<sup>196</sup> Thus, relatively mild monetary sanctions would only require that the attorney be provided with notice of the possibility of sanctions and an opportunity to argue against them.

The attention drawn to the due process concerns surrounding non-compensatory monetary sanctions should not discourage district courts from imposing these sanctions upon attorneys. Instead, district court judges should rely on the plain language of Rule 37 to adequately address these due process concerns. This position was best described by Judge Johnson in *Carlucci v. Piper Aircraft Corp.*<sup>197</sup> "It is neither necessary nor appropriate for an inferior federal court to engraft upon Rule 37 a procedural mechanism more demanding than that which the Supreme Court has deemed adequate to both guarantee due process and vindicate the policy underlying that rule."<sup>198</sup>

#### *E. Furthering the Goals of Rule 37*

Finally, non-compensatory monetary sanctions are consistent with and effectively further the main goals of Rule 37 without a finding of contempt. Non-compensatory monetary sanctions punish those who abuse the discovery process and, depending on the size of the sanction, deter others from conducting abusive discovery behavior.<sup>199</sup>

The Supreme Court has recognized the dual goals of Rule 37 to be

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193. See *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 767 n.14 (1980).

194. See *Devaney v. Continental Am. Ins. Co.*, 989 F.2d 1154, 1159 (11th Cir.1993) ("Assessment of costs and attorneys fees is . . . one of the lesser sanctions contemplated by the Federal Rules and it presents a lesser due process concern than, for example, outright dismissal of the action."); *Medical Billing, Inc., v. Medical Mgmt. Sciences, Inc.*, 169 F.R.D. 325 (N.D. Ohio 1996).

195. See *Flaks v. Koegel*, 504 F.2d 702, 712 (2d Cir. 1974).

196. See *id.*

197. 775 F.2d 1440 (11th Cir. 1985).

198. *Id.* at 1450.

199. See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983).

punishment and deterrence.<sup>200</sup> "Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.'"<sup>201</sup> However, the Supreme Court has held that the primary purpose of Rule 37 sanctions is deterrence of future discovery abuses.<sup>202</sup>

Courts are free to consider the general deterrent effect their orders may have.<sup>203</sup> Under Rule 37, the abusive individual is sanctioned to deter abuses by other parties or attorneys. This was made evident by the Supreme Court in *National Hockey League v. Metropolitan Hockey Club*, where the court stated:

If the decision of the Court of Appeals remained undisturbed in this case, it might well be that [t]hese respondents would faithfully comply with all future discovery orders entered by the District Court in this case. But other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.<sup>204</sup>

When parties or attorneys abuse the discovery process, Rule 37 sanctions are intended to punish the abusing party and to deter others from conducting similar discovery abuses.<sup>205</sup> Rule 37 sanctions achieve these goals simultaneously. In doing so, the abusive party serves as an example for others of sanctions that may be applied should parties or attorneys disobey a discovery order.

Requiring a finding of contempt prior to imposition of non-compensatory monetary sanctions does not punish or deter abusive behavior. Instead, the contempt requirement effectively rewards and promotes abusive behavior. A contempt requirement allows attorneys and parties to continually abuse the discovery process with conduct falling just short of contempt. This is of special concern when the abusing party has such large financial resources that "costs and expenses" are trivial, and where the abusing party has already accounted for these costs as a regular business expense. Furthermore, when a party seeks to stonewall the discovery process, the additional proceedings required for contempt proceedings may aid the abusive attorney or party in delaying the proceedings. Thus, requiring a finding of contempt may aid the abuser, rather than punish the abuser and deter similar abusive behavior.<sup>206</sup>

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200. See, e.g., *Roadway Express, Inc. v. Piper Aircraft Corp.*, 447 U.S. 752, 763-64 (1980).

201. *Id.* (quoting *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976)).

202. See *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538, 1542 (11th Cir. 1985) (citing *National Hockey League*, 427 U.S. at 643).

203. See *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 194 (S.D.N.Y. 1995); *Jaen v. Coca-Cola Co.*, 157 F.R.D. 146, 149 (D.P.R. 1994); *Anderson v. Beatrice Foods Co.*, 129 F.R.D. 394 (D. Mass. 1989), *aff'd*, 900 F.2d 388, 394 (1st Cir. 1990).

204. *National Hockey League*, 427 U.S. at 643.

205. See *id.*

206. See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 567 (3d Cir. 1985) (holding that a court must be able to sanction conduct by lawyers that falls just short of contempt in order to

The additional proceedings associated with the contempt requirement are also inconsistent with notions of judicial economy. The contempt requirement obliges courts to conduct endless mini-trials which will inevitably delay proceedings and circumvent the efficient administration of justice.<sup>207</sup> Thus, judges will be less likely to impose the sanction because the course of litigation will be delayed and their already overcrowded dockets will most likely become even more overcrowded.<sup>208</sup>

### CONCLUSION

Much confusion surrounds non-compensatory monetary sanctions. Courts have differed in the classification of the sanctions, authorization for the sanctions, and the amount of due process required before imposing the sanctions. As a result of this confusion, a split has developed in the circuit courts of appeal. On one side, courts equate non-compensatory monetary sanctions to a finding of criminal contempt. These courts focus on the punitive aspect of non-compensatory monetary sanctions and conclude that it is criminal in nature and thus, the sanctioned individual should be afforded the additional due process considerations afforded to defendants in criminal proceedings. On the other hand, other courts have concluded that non-compensatory monetary sanctions are appropriate sanctions authorized by Rule 37. These courts focus on the plain

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adequately carry on the court's business of deciding cases).

207. See *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1451 (11th Cir. 1985) (stating the general proposition that additional proceedings cause unneeded delay).

By making the status of the underlying action controlling over who may adjudicate allegations of discovery misconduct (that is, by the federal judge hearing the case or by the special three judge panel) and what standards will inform their deliberations (Federal Rule 37 or some local provision) the effect is to bind the hands of the trial court in an area where the Supreme Court has ruled we should promote *maximum flexibility*. It would deprive the district judge of the option to defer a ruling on sanctions so as to allow the errant attorney an opportunity to "purge" himself of the wrongdoing, or at least to mitigate his penalty, by henceforth cooperating in discovery. [Petitioner's] argument would force a court to choose between imposing an appropriate sanction for each instance of bad faith discovery conduct at the time it occurred, certifying each episode to a grievance panel, or waiting until the underlying litigation has been completed and then forwarding the entire matter to the grievance committee or appointed counsel for investigation and a hearing before judges not previously involved, with the expense and delay concomitant. Were we so to hold we would be transforming most citations of misconduct during discovery into full-fledged disciplinary proceedings. This would mire trial courts in endless delays while panels were constituted to consider potential violations of Rule 37 with the attendant result, contrary to the clear holding of the Supreme Court, of discouraging trial courts from imposing sanctions in the first place.

*Id.* (emphasis added).

208. See *id.*

language of Rule 37 and on general notions of due process to conclude that these non-compensatory monetary sanctions are authorized and do not present due process problems.

Despite the split in the circuit court opinions, this Note has provided an analysis of non-compensatory sanctions and their appropriateness. District courts should not be discouraged from imposing these sanctions on the basis of authority or due process. The plain language of Rule 37 makes it clear that the district courts are free to fashion any sanction they deem reasonable in light of the circumstances. This wide discretion may include sanctions in excess of the costs and fees incurred by the aggrieved party. Furthermore, Rule 37 provides for adequate due process to impose these sanctions. While the degree of notice and opportunity to be heard may differ depending on the severity of the sanction, courts can provide for such due process without unwarranted delays and distractions to the litigation that would most likely occur if there was a requirement of criminal contempt.

Finally, when a finding of contempt is not required, non-compensatory monetary sanctions act as tool to combat the ever-increasing problem of stonewalling. By foregoing the contempt requirement, judges can sanction, and thus deter, more discovery abuses. In so doing, the district courts are imposing the least severe and most effective available sanctions and regaining control of the discovery process.

# MEDICAL MALPRACTICE AS A BASIS FOR A FALSE CLAIMS ACTION?

PATRICK A. SCHEIDERER\*

## INTRODUCTION

The purpose of the False Claims Act of 1863 (the "FCA") is to reimburse the federal government (the "Government") for funds that are fraudulently taken from it, and to deter such fraud in the future. Congress recognized, in enacting the FCA, that if persons or entities who defraud the Government were forced to repay any funds obtained fraudulently, then individuals who might otherwise attempt such actions would be deterred. Congress, therefore, envisioned that *knowing* fraud would be avoided.

As health care becomes an ever more important debate in American society and the amount of Government funding of health care programs escalates, it is apparent that the increased likelihood of fraud by health care providers is an important problem. Under the FCA, such fraud will be deterred and the Government will be repaid for money fraudulently taken. However, the quality of health care provided to American citizens is also an important concern. In this regard, the question arises whether the FCA can or should be used to help ensure that individuals who are provided government-funded health care receive quality health care. In particular, can or should the FCA be used as an additional punishment of doctors who commit medical malpractice above and beyond the penalties currently available in a civil malpractice action? The answers are unclear.

## I. BACKGROUND: THE FALSE CLAIMS ACT

The FCA was enacted "during the Civil War . . . to combat fraud and price-gouging in war procurement contracts."<sup>1</sup> It "originated with President Lincoln . . . as a response to fraudulent and abusive practices by defense contractors" and therefore has commonly been referred to as the "Lincoln Law."<sup>2</sup> The FCA allows the Government to sue and recover from any individual "who knowingly presents, or causes to be presented [to the Government] a false or fraudulent claim for payment."<sup>3</sup> The potential recovery by the Government is "a civil penalty of not less than \$5,000 and not more than \$10,000, plus three [3] times

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\* J.D.,<sup>1</sup> 2000, Indiana University School of Law—Indianapolis; B.S., 1997, Purdue University.

1. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994).

2. Neil Getnick & Lesley Skillen, *The Civil False Claims Act, Enlisting Citizens in Fighting Fraud Against the Government*, Report of the Civil Prosecution Committee of the New York State Bar Association Commercial and Federal Litigation Section (May 1996), available in <<http://www.nysba.org/legis/civilprosecut.html>> (visited July 20, 2000).

3. 31 U.S.C. § 3729(a)(1) (1994).



the . . . damages which the Government sustains."<sup>4</sup>

Included in the FCA is what is known as the "*qui tam*" provision.<sup>5</sup> *Qui tam* actions date back to English common law and were "developed to allow informers to expose fraud against the Crown and to collect a share of the proceeds recovered. The doctrine was adopted in England's colonies and, after independence,"<sup>6</sup> the United States Congress "included *qui tam* provisions in a number of laws concerning import duties and trade."<sup>7</sup>

The *qui tam* provision of the FCA allows the *qui tam* plaintiff, known as the "relator," to bring a lawsuit on behalf of the Government against a person in violation of the FCA.<sup>8</sup> In other words, the FCA allows the relator to act as a temporary attorney general to prosecute a claim for the Government if the Government chooses not to, or gives the relator a share of the award if the Government does prosecute the claim.<sup>9</sup> If the Government prosecutes a claim successfully, and a relator provided the information that led to the prosecution, the relator is awarded between fifteen and twenty-five percent of the money returned to the United States Treasury plus attorney's fees.<sup>10</sup> If the Government does not prosecute the claim and the relator brings the lawsuit himself, he receives between twenty-five and thirty percent of any recovery plus attorney's fees.<sup>11</sup>

## II. CHANGES IN THE FALSE CLAIMS ACT

"The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing

4. *Id.* § 3729(a)(7).

5. *Id.* § 3730. The term *qui tam* is an abbreviation of the Latin phrase *qui tam domino rege quam pro se ipso in hac parte sequitur*, which means he "who brings action for the king as well as himself." Carolyn J. Paschke, Note, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, its History and its Unique Position to Influence the Health Care Industry*, 9 J.L. & HEALTH 163, 165 (1994) (quoting W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)).

6. David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 ANNALS HEALTH L. 127 (1995).

7. *Id.* at 127-28.

8. *Id.* at 128.

9. *See id.*

10. *See* 31 U.S.C. § 3730(d).

11. *See id.* § 3730(d)(2). The advantages to the *qui tam* provision should be obvious: first, individuals who know of a situation where the Government is being defrauded are motivated to come forward with such information because they know, if successful, they will benefit financially; and second, the Government need not dedicate valuable time and resources to prosecuting claims it feels are not likely to result in a successful judgment or that are not large in scale. Thus, by including the *qui tam* provision, the FCA becomes an efficient means of combating fraud against the Government because the Government receives the majority of any damages awarded in a FCA verdict with little risk.

and discouraging opportunistic behavior.”<sup>12</sup> In other words, Congress has tried to give incentive to possible relators to come forward, but it also has tried to avoid allowing the FCA to become a source of income for individuals seeking to earn a buck. With these two goals in mind, Congress has altered the reach of the *qui tam* provision and the provision “has followed an erratic pattern over the years, expanding, contracting, and then expanding again. This is especially true [regarding] the question of who may bring a *qui tam* action on behalf of the [G]overnment.”<sup>13</sup>

Since its inception, the majority of changes to the FCA center on the degree to which the relator’s information about fraudulent activities is instrumental to the Government’s case and, specifically, to the question of whom or what was the source of that information about the fraudulent activities. Initially, the requirements for relators were not strict, which made it easy for them to recover under the FCA.<sup>14</sup> Relators did not need “to bring any new information [to the case] and, in fact, could rely solely on information already in the hands of the [G]overnment.”<sup>15</sup> In the 1940s, however, people began simply to copy information from government indictments and to bring suits as *qui tam* relators even though they were not the source of such information.<sup>16</sup> Lawsuits of this type are commonly called “parasitic” lawsuits.<sup>17</sup> As a result, relators often received a percentage of the Government’s recovery without helping to break the “conspiracies of silence” surrounding Government fraud.<sup>18</sup> Such parasitic actions reached their high point in *United States ex rel. Marcus v. Hess*,<sup>19</sup> “in which the United States Supreme Court held that a relator could bring a *qui tam* action, even if all of the relator’s information came from the [G]overnment’s own investigation.”<sup>20</sup> This result was obviously too liberal a use of the FCA and expanded, too far, the Government’s goal of encouraging possible relators to come forward.

Eleven months after the Supreme Court’s ruling in *Marcus*, President Franklin D. Roosevelt signed amendments to the FCA, which were intended to tighten its scope.<sup>21</sup> Congress amended the statute to reflect that the FCA’s intent

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12. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

13. *Ryan*, *supra* note 6, at 128.

14. *See id.*

15. *Id.*

16. *See Paschke*, *supra* note 5, at 165.

17. *Id.* These lawsuits exploited the *qui tam* provision and in no way assisted the Attorney General’s office in its fight against fraud or provided a deterrent to its commission. Rather, they created a “race to the courthouse” between Government attorneys and the private relator to recover the Government’s losses. *Id.* at 166.

18. *Id.*

19. 317 U.S. 537 (1943).

20. *Ryan*, *supra* note 6, at 127; *see also Marcus*, 317 U.S. at 545-46.

21. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994).

was to encourage relators to provide the Government with new information regarding false claims, not to encourage parasitic lawsuits where the relator really contributed nothing to the case.<sup>22</sup> In this regard, the 1943 amendments denied jurisdiction for *qui tam* actions that were based on information already possessed by the Government at the time the suit was filed.<sup>23</sup> The courts reacted to these amendments by barring jurisdiction whenever the Government possessed information concerning the fraudulent act on which the claim was based, even when such information was provided to the Government by the *qui tam* plaintiff before the claim was filed, which was an absurd result.<sup>24</sup>

Although the 1943 amendments to the FCA relieved the problem of parasitic lawsuits, the amendments proved to be overly restrictive, "especially when the letter of the law was applied while its spirit was ignored."<sup>25</sup> This excessive restrictiveness was demonstrated in the Seventh Circuit's 1984 decision of *United States ex rel. Wisconsin v. Dean*,<sup>26</sup>

wherein the State of Wisconsin attempted to bring a *qui tam* action against a psychiatrist who had engaged in Medicaid fraud. [T]he court held that the *qui tam* action was barred because it was based on information already in the hands of the United States. The irony was that the information had been given to the United States by the State of Wisconsin. Therefore, a strict interpretation of the 1943 provision required the dismissal of the State of Wisconsin's *qui tam* action, even though the state was the originator of the information and the information was essential to the prosecution of the psychiatrist.<sup>27</sup>

This interpretation of the FCA and its corresponding *qui tam* provision, therefore, unfairly denied the relator money to which he was entitled.<sup>28</sup>

The result in *Wisconsin* created some criticism that set the ball rolling for a less restrictive version of the FCA. The National Association of Attorneys General (the "NAAG") adopted a resolution that strongly urged Congress to rectify the court's restrictive decision, calling it "an unnecessary inhibitor to the detection of fraud on the Government."<sup>29</sup> Congress, feeling the pressure from NAAG, responded with the False Claims Amendment Act of 1986 (the "1986

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22. See Paschke, *supra* note 5, at 166.

23. See *id.*

24. See *id.*

25. Ryan, *supra* note 6, at 129.

26. 729 F.2d 1100 (7th Cir. 1984).

27. Ryan, *supra* note 6, at 129.

28. Further, this interpretation works against the original congressional goal of providing an incentive to possible relators to come forward with information about fraud committed against the Government. If possible relators thought there was a good chance they would not be rewarded for blowing the whistle, they would be deterred from coming forward, especially if the social fallout of coming forward was great.

29. Paschke, *supra* note 5, at 166 (quoting *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1154 (3d Cir. 1991)).

Amendments”) which had the purpose of “enhanc[ing] the Government’s ability to recover losses sustained as a result of fraud against the Government.”<sup>30</sup> Concerned about “sophisticated and widespread fraud” depleting national funds, Congress concluded that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”<sup>31</sup> Thus, Congress realized that a “middle of the road” approach was needed between the goals of encouraging possible relators to come forward and of avoiding parasitic lawsuits from such individuals.

“The 1986 [A]mendments . . . reflect the long process of trial and error that engendered them.”<sup>32</sup> The 1986 Amendments “must be analyzed in the context . . . of rejecting suits which the [G]overnment is capable of pursuing itself, while promoting those which the [G]overnment is not equipped to bring on its own.”<sup>33</sup> One commentator has pointed out the benefits of the 1986 Amendments. They “have made it easier to pursue fraud actions, *qui tam* suits have increased and received greater publicity, leading to greater awareness of the law and, in turn, to the filing of still more actions.”<sup>34</sup>

### III. TYPICAL APPLICATIONS OF THE FCA IN THE HEALTH CARE ARENA

“Although the original purpose of the [FCA] statute was to combat defense fraud, the 1986 [A]mendments create incentives and give relators power to bring *qui tam* actions in response to fraud in other areas of Government spending.”<sup>35</sup> For example, the statute has now begun to make its mark in the health care industry where the Government spends a massive amount of money in the funding of Medicare and Medicaid programs.<sup>36</sup> The application of the FCA to the health care industry has taken several forms and has been successful in returning fraudulently taken money to the Government where it belongs.

One typical application of the FCA to the health care industry is in the area of “mischarging” or “false billing” to Medicare or Medicaid. Mischarging or false billing generally occurs when health care providers file false claims for goods or services that were not provided or delivered in order to receive funds fraudulently.<sup>37</sup> A second common mischarging or false billing scheme involves “claims made to the Government for medical services . . . performed by an attending physician when the service was actually performed by a nurse or other

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30. SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, 99th Cong., 2d Sess., at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

31. S. REP. NO. 99-345, Cong., 2d Sess., at 1-2, *reprinted in* 1986 U.S.C.C.A.N. at 5266-67.

32. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

33. *Id.*

34. Ryan, *supra* note 6, at 129.

35. Paschke, *supra* note 5, at 164.

36. *See id.* at 164-65.

37. *See Types of Qui Tam Cases* (visited Oct. 12, 1998) <<http://www.quitam.com/quitam3.html>>.

provider that should have been billed at a lower rate.”<sup>38</sup> Although these are the most common forms of mischarging and false billing, such fraud can take many forms.<sup>39</sup>

An example of a mischarging and false billing can be seen in the Fifth Circuit case of *Peterson v. Weinberger*.<sup>40</sup> In that case, the Government brought suit under the FCA against a physician and an owner of a nursing home for billing Medicare for physical therapy services that were never provided in order to receive payment without doing any work.<sup>41</sup> This type of false billing is all too common. Individuals, such as the defendants in *Peterson*, often assume that, due to the large amount of paperwork and reimbursement requests that the Government receives, their false requests will slip through the cracks and the Government will not take the time to investigate such billing. Thus, the risk of being caught is minimal, yet the financial reward to the person can be enormous.

The second typical application of the FCA to the health care industry involves overutilization. Overutilization occurs when physicians order unnecessary tests and services in an attempt to gain extra income, regardless of the patient's needs.<sup>42</sup> Overutilization can take the form of multiple tests being ordered when only one test would have provided the necessary diagnostic information. When more than one test is performed, a profit is made by billing Medicare or Medicaid.<sup>43</sup> Further, overutilization also occurs when a doctor performs surgery on a patient before any other type of treatment or medication has been tried.<sup>44</sup> Such a scheme becomes attractive so long as the surgery can somehow be justified as necessary for the patient's care.<sup>45</sup> Once some justification for the overutilization exists, it becomes a relatively easy step for a health care provider to manipulate the reimbursement system through such suspect activities without being detected.<sup>46</sup>

Even though there are a variety of ways to defraud the Government through the health care industry, most *qui tam* actions brought against health care providers are settled without publicity.<sup>47</sup> This is due primarily to how sensitive

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38. *Id.*

39. Mischarging or false billing can take the form of “charging for more expensive services than were provided [or upcoding;] . . . private insurers charging Medicare [or] Medicaid when the patient was actually covered primarily by the private insurer; charging patients who received outpatient treatment or tests as if they had received inpatient services or tests because Medicare [or] Medicaid pays more for inpatient treatment; and faulty computer systems that either intentionally or accidentally overbill.” Paschke, *supra* note 5, at 174.

40. 508 F.2d 45 (5th Cir. 1975)

41. *See id.* at 48-49.

42. *See* Paschke, *supra* note 5, at 174.

43. *See id.*

44. *See id.*

45. *See* Theodore N. McDowell, Comment, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments: Their Impact on the Present Health Care System*, 36 EMORY L. J. 691, 714 (1987).

46. *See id.*

47. *See* Paschke, *supra* note 5, at 174.

the health care industry is to negative public opinion.<sup>48</sup> A lawsuit involving fraudulent claims by a health care provider that were paid by the Government and taxpayers can be highly detrimental to the industry. The general public may lose confidence in the particular provider involved, thereby harming that provider's business.<sup>49</sup> Thus, there is a strong incentive for a health care provider to settle any false claims actions to minimize such damage.<sup>50</sup>

#### IV. ELEMENTS OF A FALSE CLAIMS ACTION

To prevail in a false claims lawsuit, the plaintiff, a realtor, or the Government, must prove three elements.<sup>51</sup> First, a plaintiff must prove that the defendant submitted a "claim" for payment to the Government or that the defendant caused a third party to submit a claim to the Government.<sup>52</sup> If no claim was submitted by the defendant, then the individual or entity cannot be found to have violated the FCA. Second, the plaintiff must also demonstrate that the defendant's or the third party's claim was "false or fraudulent."<sup>53</sup> If the claim was not false or fraudulent in any way, then the purpose of the FCA is not affected and, thus, there is no violation. Third, the plaintiff must prove that the defendant either "knowingly" filed a false or fraudulent claim or "knowingly" caused a third party to file such a false or fraudulent claim.<sup>54</sup> This requirement is perhaps the most difficult of the three elements to prove when using medical malpractice as a basis for an FCA violation. Each of these elements is described in greater detail below.

##### A. Claim

The definition of claim under the FCA has been at the center of much litigation.<sup>55</sup> A claim is commonly interpreted as "any demand or request for payment," which includes invoices, vouchers, and oral or written requests for payment.<sup>56</sup> The 1986 Amendments added a definition of "claim" to the FCA by

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48. *See id.*

49. *See id.* at 174-75.

50. As a result, many such fraudulent schemes are not prosecuted and little publicity is given to them. This in turn leads to less awareness in the medical community of the existence of such schemes, allowing more medical providers to get away with similar behavior.

51. *See* 31 U.S.C. § 3729 (1994).

52. 31 U.S.C. § 3729(a)(1); *see also* Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 U. MO. KAN. CITY L. REV. 30, 34 (1996); Lisa Michelle Phelps, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003, 1008 (1998).

53. 31 U.S.C. § 3729(a); *see also* Phelps, *supra* note 52, at 1008.

54. 31 U.S.C. § 3729(b); *see also* Phelps, *supra* note 52, at 1008.

55. *See* Phelps, *supra* note 52, at 1008 n.16.

56. *Id.* (quoting John T. Boese, *Qui Tam, Beyond Government Contracts*, PLI Litig. & Admin. Practice Course Handbook Series No. H-456, at 7, 16-17 (1993)).



stating it

includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.<sup>57</sup>

Accordingly, such claims submitted to either the federal government under the Medicare program or to state agencies under the Medicaid program are subject to civil enforcement under the FCA. The application of the definition in the 1986 Amendments is fairly straightforward and easy to apply.

### *B. False or Fraudulent*

Under the FCA, false or fraudulent means that a reimbursement claim is submitted to the Government that the claimant is not actually entitled to receive. False or fraudulent claims can take many forms, but generally take the form of submitting claims for services not actually performed or billing at a higher rate than is warranted. In addition, false records or false statements offered in support of a claim are also false claims.<sup>58</sup> This element is explained in more detail later when it is applied to medical malpractice.<sup>59</sup>

### *C. Knowingly*

Since 1863, the FCA has required that the defendant in a false claims action knowingly commit the prohibited conduct. However, it was not until the 1986 Amendments the statute defined the term "knowingly."<sup>60</sup> The history of the knowledge requirement is informative in determining what intent is needed when using medical malpractice as a basis for a false claims action.<sup>61</sup>

Prior to the 1986 Amendments, the federal circuit courts were split as to what constituted knowingly filing a false or fraudulent claim under the FCA. The Fifth, Ninth, and Eleventh Circuits have held that the knowledge requirement of the FCA "required proof that a defendant acted with the intent to deceive the [G]overnment."<sup>62</sup> The Eleventh Circuit further elaborated that an intent to

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57. 31 U.S.C. § 3729(c) (1994).

58. See Ryan, *supra* note 6, at 130.

59. See *infra* Part VI. In most situations, it is easy to determine whether a claim for reimbursement of medical treatment expenses is false or fraudulent because the person receiving the money is not entitled to such money because he did not perform the work required for such payment and most likely lied.

60. Pamela H. Bucy, *Civil Prosecution of Health Care Fraud*, 30 WAKE FOREST L. REV. 693, 697 (1995).

61. See *id.*

62. United States v. TDC Mgmt. Corp., 24 F.3d 292, 296-97 (D.C. Cir. 1994); see also

deceive was required because that intent was also a requisite element of common law fraud and "[n]o statute is to be construed as altering the common law, farther than its words import."<sup>63</sup> Alternatively, "[t]he Ninth Circuit simply could not believe that Congress 'intended to catch the hapless with the heavy penalties which may be imposed under the False Claims Act.'"<sup>64</sup>

On the other hand, the Seventh, Eighth and Tenth Circuits, along with the Court of Claims, did not agree that an intent to deceive was needed to meet the knowledge requirement.<sup>65</sup> Instead, these circuits held that an "intent to deceive" was not a requisite element of proof under the FCA before 1986.<sup>66</sup> Therefore, the bar was lowered in these jurisdictions to include more individuals and entities that could be prosecuted under the FCA and be found to have "knowingly" violated the law.

Disapproving of the pre-1986 split among jurisdictions, in 1986 Congress took a step forward and defined "knowingly" under the FCA.<sup>67</sup> Knowingly is defined by the 1986 Amendments to mean that, with respect to the false information, a person must: "(1) ha[ve] actual knowledge of the [false] information; (2) act [] in deliberate ignorance of the truth or falsity of the information; or (3) act in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required."<sup>68</sup>

Whether this description of the standard of liability is viewed as a "clarification" or as an outright change in the law, it is clear that the 1986 Amendments affect FCA cases in many jurisdictions.<sup>69</sup> Specifically, the 1986 Amendments affect those jurisdiction "which ha[ve] held that an intent to

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United States v. Davis, 809 F.2d 1509, 1512 (11th Cir. 1987); United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Mead, 426 F.2d 118, 121 (9th Cir. 1970).

63. *TDC Mgmt. Corp.*, 24 F.3d at 297 (quoting *Davis*, 809 F.2d at 1512).

64. *Id.* (quoting *Mead*, 426 F.2d at 121). Working under this premise, the Ninth Circuit raised the culpability bar in order to avoid punishing, under the FCA, those individuals who were not intentionally involved in defrauding the Government.

65. *See id.*

66. *Id.*; *see also* United States v. Hughes, 585 F.2d 284, 287-88 (7th Cir. 1978); Miller v. United States, 550 F.2d 17, 23 (Ct. Cl. 1977); United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 56-58 (8th Cir. 1973); Fleming v. United States, 336 F.2d 475, 479 (10th Cir. 1964).

67. *Bucy*, *supra* note 60, at 697.

68. 31 U.S.C. § 3729(b) (1994). "The drafters of the 1986 [A]mendments gave a two-fold explanation for this definition of [knowingly]: [first,] they wanted to make it easier to prove liability under the FCA;" and second, they sought to standardize the knowledge requirement under the Act. *Bucy*, *supra* note 60, at 697; *see* SENATE COMM. ON JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, Cong., 2d Sess., at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272. The drafters were especially concerned about "corporate officers who insulate themselves from knowledge of false claims submitted by lower-level subordinates" and as such, drafted the new knowledge requirements to make it more difficult for these officers to avoid liability. *Id.*

69. United States v. Hill, 676 F. Supp. 1158, 1165 (N.D. Fla. 1987); *see also* United States v. Davis, 809 F.2d 1509, 1512 (11th Cir. 1987).

deceive or defraud the Government is a discrete element of [FCA] liability."<sup>70</sup>

Knowingly is now defined by the statute, however, its application to various types of situations must be analyzed to determine exactly what constitutes knowledge of the false information involved in a FCA case. In the new definition, "[t]he deletion of the 'specific intent to defraud' requirement now brings less culpable conduct within the ambit of the law."<sup>71</sup> A violator under the FCA did not have to intend to deceive, but rather he must only have made a knowing presentation of a claim that is either fraudulent or simply false.<sup>72</sup> In other words, a violation of the FCA occurs with the knowing presentation of what is known to be false.<sup>73</sup> Additionally, it is not a defense that the relevant government official knows of the falsity of the claim.<sup>74</sup> Thus, a *qui tam* action will survive a summary judgment motion if the relator produces sufficient evidence to support an inference of knowing fraud.<sup>75</sup>

## V. MEDICAL MALPRACTICE

With the above description of the FCA in mind, the central question of my analysis is: Whether medical malpractice can serve as a basis for a cause of action under the FCA? If so, what is the justification for allowing such an application? To determine whether such an application of the FCA is allowable, one must first analyze what constitutes medical malpractice and whether it makes sense to use it as a basis for a false claims action.

Medical malpractice is negligence committed by a professional health care provider, whose performance of duties departs from the standard of practice of those with similar training and experience and results in harm to a patient or patients.<sup>76</sup> A health care provider is negligent when a patient is harmed because the provider failed to meet the generally accepted standards of skill and care.<sup>77</sup> Health care providers, however, cannot guarantee the results of medical treatment.<sup>78</sup> Thus, a patient's malpractice claim is not valid just because his or her treatment was not successful.<sup>79</sup> Rather, the important inquiry is whether the

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70. *Hill*, 676 F. Supp. at 1165.

71. *Id.* at 1170 (assuming arguendo that there is a difference between knowingly filing a false or fraudulent statement and filing a statement with the specific intent to defraud).

72. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *see also* 31 U.S.C. § 3729(a)(1) & (2).

73. *See Hagood*, 929 F.2d at 1421.

74. *See id.* (citing *United States v. Ehrlich*, 643 F.2d 634, 638-39 (9th Cir. 1981)).

75. *See United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1995); *see also* David C. Hsia, *Symposium on Qui Tam Litigation: Application of Qui Tam to the Quality of Health Care*, 14 J. LEGAL MED. 301, 316 (1993).

76. *See Hsia, supra* note 75, at 310.

77. *See What Is Medical Malpractice?* (visited Oct. 14, 1998) <<http://www.babbitt-johnson.com/mal.html>>; *see also* Hsia, *supra* note 75, at 310.

78. *See What is Medical Malpractice?*, *supra* note 77.

79. *See id.*

health care provider's treatment fell below the general standard of care for the profession.

Although medical malpractice is limited to negligence which occurs in the course of medical treatment, the basic legal issues involved in malpractice are the same as the legal elements in common negligence.<sup>80</sup> The basic elements involved in a successful malpractice claim, as in common negligence, are: (1) the establishment of a standard of care to which the defendant's conduct is to be compared; (2) proving a breach of that standard of care by the defendant; (3) proof of legal causation by the defendant's conduct; and (4) proof of damages to the plaintiff.<sup>81</sup>

Generally, standard of care is defined as the manner in which a "reasonable, careful or prudent person would behave in similar circumstances" to which the defendant was subjected.<sup>82</sup> Breach of the standard of care occurs when the defendant's conduct deviates from the established standard of care.<sup>83</sup> Negligence usually can be proven when the defendant's breach of the standard of care "proximately caused" damages to the plaintiff that were physical or emotional in nature.<sup>84</sup>

## VI. THE FALSE FANTASY

At the center of the inquiry of whether medical malpractice performed by a doctor or other health care provider can be the basis for a false claims cause of action under the FCA is determining whether the doctor's claim in any such circumstance should be considered false. Logically it seems that when a doctor performs some medical service on a patient and then goes through the normal routine of submitting a bill to Medicare or Medicaid for reimbursement and is subsequently reimbursed, there is nothing false about that process. The doctor is merely seeking to be reimbursed for a treatment that he or she actually performed. It is hard to justify finding fault with the doctor above and beyond the damages that will likely be imposed against him in a subsequent civil malpractice suit by the victim of the alleged faulty medical treatment. That is exactly what allowing medical malpractice as a basis for a false claims action

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80. See Anthony E. Palmer, *Medical Malpractice Law in Florida* (visited Oct. 14, 1998) <<http://www.cafelaw.com/medmal.html>>.

81. See *id.* To determine, therefore, whether medical malpractice exists, the questions become: (1) how would a reasonable, careful, and prudent doctor, hospital or other health care provider behave in the same or similar circumstances; (2) did the doctor, hospital, or other health care provider breach that standard of care in this specific situation; (3) was the unreasonable, careless, or inappropriate behavior on the part of the doctor, hospital or other health care provider the proximate cause of the injury to the patient; and (4) what damages follow. See *id.* If these questions are answered in the affirmative by the finder of fact and damages are proven, then the defendant is subject to liability for medical malpractice.

82. *Id.*

83. See *id.*

84. *Id.*

will do. Thus, it is crucial to determine, by analyzing the case law, what exactly has been found by the courts to be a false claim under the FCA. The first case that gives insight into this analysis is *United States ex rel. Pogue v. American Healthcorp, Inc.*<sup>85</sup>

The issue in *Pogue* was whether a claim for payment submitted to Medicare by a provider who is or was in violation of the anti-kickback statute is rendered a false claim under the FCA because of the anti-kickback violation alone.<sup>86</sup> The court in *Pogue* found that allegations that the defendant health care provider submitted requests to the Government for reimbursement, after individual doctors had referred Medicare and Medicaid patients to the provider in violation of federal anti-kickback and self-referral statutes, stated a prima facie case of an FCA violation.<sup>87</sup> The court concluded that the FCA "was intended to govern not only fraudulent acts that create a loss to the [G]overnment but also those fraudulent acts that cause the [G]overnment to pay out sums of money to claimants it did not intend to benefit."<sup>88</sup> Under this rationale, therefore, it would seem that almost any payment that a person or entity receives from the Government could violate the FCA if it were later discovered that the person or entity receiving the payment or reimbursement had violated any law.

The court in *Pogue*, however, also noted that "the Supreme Court cautioned in *McNinch* . . . [that] the False Claims Act was not designed to punish every type of fraud committed upon the government. It was not intended to operate as a stalking horse for enforcement of every statute, rule, or regulation."<sup>89</sup> Even though the legislative history was read to include the court's application of the FCA, the court in *Pogue* realized that the FCA does have an outer boundary and that this application came close to crossing it. The outer boundary the FCA seeks to avoid is a situation where a false claims cause of action is added to any number of lawsuits as an additional enforcer of preexisting laws. Such a result was not the intent of the drafters of the FCA and should be avoided.

Another case adds insight into what constitutes a false claim under the FCA is *United States ex rel. Milam v. Regents of the University of California*.<sup>90</sup> The issue in *Milam* was whether researchers who relied on inaccurate scientific studies and who also "employed practices that irreconcilably deviated from those that are commonly accepted within the scientific community," had submitted

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85. 914 F. Supp. 1507 (M.D. Tenn. 1996).

86. See Kaz Kikkawa, Note, *Medicare Fraud and Abuse and Qui Tam: The Dynamic Duo or the Odd Couple?*, 8 HEALTH MATRIX 83, 103 (1998).

87. See *Pogue*, 914 F. Supp. at 1507.

88. *Id.* at 1513. This is a very broad reading of the FCA. However, the legislative history supports this holding by stating that "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." *Id.* (quoting SENATE COMM. ON THE JUDICIARY, FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, Cong., 2d Sess. 4 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274).

89. *Id.* (citing *United States v. McNinch*, 356 U.S. 595 (1958)).

90. 912 F. Supp. 868 (D. Md. 1995).

false claims for Government research funding in violation of the FCA.<sup>91</sup> The researchers relied on previously published scientific results, which they could not duplicate, to receive research grants from the government for further experimentation.<sup>92</sup>

The court in *Milam* granted summary judgment to the defendants.<sup>93</sup> The court found that “[a]t most, [it was] presented with a legitimate scientific dispute, not a fraud case. Disagreements over scientific methodology do not give rise to False Claims Act liability.”<sup>94</sup> In this regard, the court rationalized that “the legal process is not suited to resolving scientific disputes or identifying scientific misconduct.”<sup>95</sup>

Thus, the court in *Milam* found that the government’s attempted application of the FCA to the facts of that case went beyond the statute’s reach and did not allow the case to go to trial. However, this case is a good example of how the FCA could be expanded if a convincing Government prosecutor or *qui tam* relator found himself in front of a gullible court.

Another informative case in determining what constitutes a false claim under the FCA is *United States ex rel. Marcus v. Hess*.<sup>96</sup> The *Marcus* case established that claims for payment submitted to the Government pursuant to a fraudulently obtained contract violate the FCA, even if the claims themselves do not contain false statements.<sup>97</sup> In *Marcus*, the Supreme Court held that an electrical contractor who obtained a federally subsidized public works contract through collusive bidding violated the FCA even though the contractor’s later claims for payment were submitted to the Government through an intermediary and contained no false statements.<sup>98</sup> Therefore, the court expanded the scope of a fraudulent claim to include those claims that are not fraudulent themselves, but rather, are based on previous fraudulent activity.

The three cases just discussed give outer boundaries to what is considered a false claim under the FCA. On the one hand, it seems that if a Government reimbursement or any other type of Government payment was based on a past or continuing violation of law, then a *prima facie* case of a FCA violation exists.<sup>99</sup> Included in this category are fraudulently obtained contracts, even if a subsequent request for payment by the Government contains no false statements.<sup>100</sup> Further, a violation may exist not only if a law was violated, but also merely if the

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91. *Id.* at 886.

92. *See id.* at 870, 881.

93. *See id.* at 887.

94. *Id.* at 886.

95. *Id.*

96. 317 U.S. 537 (1943).

97. *See id.* at 544.

98. *See id.* at 542-44.

99. *See United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1513 (M. D. Tenn. 1996).

100. *See Marcus*, 317 U.S. at 544.



Government pays out money to claimants who do not deserve it.<sup>101</sup> On the other hand, as the court in *Milam* explained, FCA liability does not extend to disagreements over scientific methodology.<sup>102</sup> In other words, it is not a violation of the FCA to receive money from the Government even though your scientific methods may be faulty or unfounded, as long as there is some basis for the methods used. This is the result even though it can be argued that the Government did not intend to benefit those employing faulty scientific methods.

The question now is whether medical malpractice falls under the category of scientific disagreement or whether it can be characterized as the Government paying out money to individuals that it did not intend to benefit. When a doctor is faced with a situation where he is treating a patient, he is making a professional, scientific judgment with which others may disagree, but which a doctor has the responsibility of making. Although it is true that the Government likely did not intend to benefit those who give meaningless or improper treatment to patients, the Government did intend to benefit those doctors who are put in decision making positions and who treat patients based on their training.<sup>103</sup> Thus, it does not seem logical or effective to label a doctor's request for payment to the Government as false, even if it later turns out that the doctor committed malpractice.

## VII. THE *ELEMENT* FANTASY

In determining whether any action violates a federal or state statute, the central inquiry is whether the action meets all of the elements required by the statute. If any one of the elements is not met, then the action in question does not violate the statute. Following this rationale, for medical malpractice to be the basis for a false claims cause of action, it must meet all of the elements required by the FCA that were previously described.<sup>104</sup> Many cases have addressed specifically how to apply the elements of the FCA to a given set of facts. The first of these is a false claims action filed against the Tucker House II, Inc. ("Tucker House") nursing home and its management company, GMS Management-Tucker, Inc. ("GMS") for inadequate care provided to its residents. Although the case was settled before trial, it gives insight into whether the elements of a medical malpractice cause of action meet the requirements of a false claims cause of action.

On February 21, 1996, the federal government filed a false claims cause of

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101. See *Pogue*, 914 F. Supp. at 1513.

102. See *United States ex rel. Milam v. Regents of the Univ. of Cal.*, 912 F. Supp. 868, 886 (D. Md. 1995).

103. It can hardly be justified to use the FCA to punish a doctor, with the FCA, for making a professional judgment and acting on that judgment, especially when any faulty decisions falling below a doctors' standard of care will be punished with a civil malpractice claim.

104. See *supra* Part IV. Although determining whether the elements are met is analyzed throughout this paper, this section goes into greater detail by analyzing specific cases that have addressed this issue.

action against the Tucker House nursing home and its management company, GMS.<sup>105</sup> Tucker House had earned a reputation in the community as a nursing home that provided quality long-term care to the elderly population in the community who had nowhere else to live.<sup>106</sup>

Tucker House contracted with GMS to run the home and submit bills for reimbursement to the federal government.<sup>107</sup> The quality of care given by the nursing home, however, was considered by the Government to be below the standard of care for similarly situated nursing homes. To remedy this problem, the Government used the FCA to allege that billing the Government "was the equivalent of recklessly submitting a false claim" in violation of the FCA.<sup>108</sup> In its case against the nursing home, the Government framed the central question as: "[D]oes every successful civil malpractice case against a Medicare/Medicaid provider carry with it the seeds of a civil false claims prosecution?"<sup>109</sup> The question at hand, therefore, was whether the negligent care provided by the nursing home and its management staff could serve as a basis for a FCA cause of action.<sup>110</sup>

Since the management company agreed to pay the government a \$575,000 settlement within days after the plaintiffs filed their claim, the merits of the application of the FCA to the quality of the nursing home care were never decided by the court<sup>111</sup> and remain undecided today. This settlement, however, raised a fury of criticism in the health care industry and among legal professionals and scholars that practice in this area. For example, Mustokoff noted that allowing the FCA to be used in this way was not "an ingenious exercise of federal power," but was like "the heavy hand of the 800-pound gorilla."<sup>112</sup> The commentator went further by adding that "[t]he Tucker House II case presents an example of the FCA being stretched beyond recognition to redress the evils of inadequate care. While the goal is laudable, the means provided by the Act are both ill suited and unnecessary to deal with issues of quality of care."<sup>113</sup>

At the center of the negative criticism by the health care industry and legal commentators is their premise that the elements of a common civil malpractice cause of action are not identical to and do not match up well with the elements

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105. See Michael M. Mustokoff et al., *The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Ingenuity or the Heavy Hand of the 800-Pound Gorilla*, 6 ANNALS HEALTH L. 137 (1997). Tucker House II, Inc. was a community-run organization that took over the ownership of a nursing home called the Tucker House when the previous owners filed bankruptcy and were forced to relinquish control of the nursing home. See *id.* at 139.

106. See *id.* at 139.

107. See *id.*

108. *Id.* at 137.

109. *Id.* at 139.

110. See *id.* at 141.

111. See *id.* at 137-38.

112. *Id.* at 137.

113. *Id.* at 143.

of a common civil FCA cause of action.<sup>114</sup> The crucial inquiry into whether a health care provider has performed malpractice is whether the "provider's treatment [was] reasonable when viewed against the prevailing standard of medical care" for his or her profession and given his or her circumstances.<sup>115</sup> Failing to meet this prevailing standard of care "is not the equivalent of a reckless evaluation of that care or even deliberate ignorance in submitting a bill for the care provided" as required by the elements of a false claims cause of action under the FCA.<sup>116</sup> Much less, it is simply inconceivable that a doctor's innocent professional mistake can constitute an intentional presentation of a false claim to the Government for payment.

Even though it is essential that the quality of health care given to Medicare and Medicaid patients be as high as possible, using the "exploding canister of a fraud statute" to accomplish this goal is a stretch of the law.<sup>117</sup> "There is no need to resort to the statutory equivalent of a Saturday night special available to any gunslinger able to spell 'qui tam.'"<sup>118</sup>

The second specific case used to analyze and determine whether the requisite elements of a medical malpractice cause of action coincide with a false claims cause of action is a defense contract case out of the Ninth Circuit called *Wang ex rel. United States v. FMC Corp.*<sup>119</sup> In that case, Chen-Cheng Wang, a mechanical engineer in the defense contracting industry, was fired from his job at FMC Corporation ("FMC").<sup>120</sup> Subsequently, he brought a FCA cause of action as a relator under the statute's *qui tam* provision.<sup>121</sup> Wang alleged that FMC had defrauded the Government on four separate occasions involving defense contracts between the Government and FMC.<sup>122</sup> Specifically, he alleged that FMC's low level of performance and related mistakes on those contracts led to overpayments by the Government.<sup>123</sup>

Based on Wang's claim and the resulting discovery phase of the trial, the Ninth Circuit found that Wang failed to produce enough evidence to support an inference that FMC had committed fraud and that all reasonable inference weighed against Wang's claim.<sup>124</sup> The court, looking at a decision it had made in an earlier case, noted that:

Innocent mistake is a defense to the criminal charge or civil complaint.  
So is mere negligence. The statutory definition of "knowingly" requires

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114. See *id.* at 142.

115. *Id.*

116. *Id.*

117. *Id.* at 145.

118. *Id.*

119. 975 F.2d 1412 (9th Cir. 1992).

120. See *id.* at 1414-15.

121. See *id.* at 1414.

122. See *id.* at 1415.

123. See *id.* at 1415-16.

124. See *id.* at 1420.

at least "deliberate ignorance" or "reckless disregard" . . . What constitutes the offense is not intent to deceive but knowing presentation of a claim that is either "fraudulent" or simply "false." The requisite intent is the knowing presentation of what is known to be false.<sup>125</sup>

The court found that, for each of his claims, "Wang [had] no evidence that FMC committed anything more than 'innocent mistakes' or 'negligence'" and that Wang's evidence consisted of nothing more than his own assessment of FMC's level of performance of the various defense contracts.<sup>126</sup> On this basis, the court additionally found that "[w]ithout more, the common failings of engineers and other scientists are not culpable under the Act" and that neither "lack of engineering insight," "[b]ad math," "innocent mistakes," nor "negligence" constitute the basis of a false claims cause of action.<sup>127</sup> Rather, there must be some additional culpability for the FCA to be violated and for the goals of the statute to be served.<sup>128</sup>

Other courts have adopted the reasoning of the court in *Wang*. One court stated that "[t]he heart of fraud is an intentional misrepresentation . . . . [Negligent misrepresentations] or innocent misstatements, for example, do not subject [G]overnment contractors to liability for fraud."<sup>129</sup>

Although the *Wang* case dealt with a defense contract, the court's holding demonstrates the proper application of the FCA to the health care industry and to whether medical malpractice can serve as a basis for a false claims cause of action. Specifically, a doctor should not be subjected to false claims liability based on a mere mistake, negligence, or lack of insight. Such mistakes, negligence, or lack of insight do not reach the level of immoral wrongdoings that the FCA seeks to punish. Rather, a doctor's mistake is merely a scientific error

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125. *Id.* (quoting *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991)).

126. *Id.*

127. *Id.* at 1420-21.

128. The court summed up Wang's attempt to use the FCA in this situation by focusing on the knowledge requirement in a false claim cause of action. The following summation is a good recitation of how the FCA should be viewed and applied to any given case and how it can be specifically used in determining whether medical malpractice should be the basis for a false claims cause of action. The court stated that:

Wang's case betrays a serious misunderstanding of the Act's purpose. The weakest account of the Act's "requisite intent" is the "knowing presentation of what is known to be false." The phrase "known to be false" in that sentence does not mean "scientifically untrue"; it means "a lie." The Act is concerned with ferreting out "wrongdoing," not scientific errors. What is false as a matter of science is not, by that very fact, wrong as a matter of morals. The Act would not put either Ptolemy or Copernicus on trial.

*Id.* at 1421 (emphasis added) (citations omitted).

129. *X Corp. v. Doe*, 816 F. Supp. 1086, 1093 (E.D. Va. 1993), *aff'd sub nom. Underseal v. Underseal*, 17 F.3d 1435 (4th Cir. Va. 1994); *see also Hagood*, 929 F.2d at 1421.

or a negligent mistake, rather than a false claim.<sup>130</sup>

The court's decision in *Wang*, therefore, justifies the argument that allowing medical malpractice as a basis for a false claims action is an unwarranted stretch of the FCA and, thus, should not be permitted. Not only are the elements of each cause of action dissimilar, but the goals of the FCA will not be advanced by such an application.

### VIII. OTHER CASE LAW

Although few cases have determined or analyzed whether medical malpractice can serve as a basis for a false claims cause of action under the FCA, some cases have focused on specific areas and applications of the FCA that are informative to this inquiry. The first of these cases is *United States v. Krizek*.<sup>131</sup> This case is helpful in ferreting out what type of negligence reaches the level of reckless disregard as to the truth or falsity of information under the FCA.

On January 11, 1993, the United States filed a false claims action against Dr. George and Blanka Krizek.<sup>132</sup> The Government alleged that the Krizeks had submitted false bills for Medicare and Medicaid psychiatric patients whom Dr. Krizek had treated.<sup>133</sup> Dr. Krizek was a psychiatrist who left the billing operations of his practice to his wife.<sup>134</sup>

The Government, in its false claims action against the Krizeks, asserted that Dr. Krizek treated some patients who should have been discharged from the hospital more quickly.<sup>135</sup> Also, the Government asserted that other patients of Dr. Krizek suffered from conditions which could not be helped through psychotherapy sessions.<sup>136</sup> Further, it was suggested that the length of the sessions should have been abbreviated in some cases.<sup>137</sup> Finally, the Government claimed that Mrs. Krizek's sloppy billing practices led to the billing of Medicare and Medicaid for longer sessions than Dr. Krizek actually performed and that Dr. Krizek was therefore not entitled to the amount of payment that he received.<sup>138</sup>

In ruling on the issue of whether Dr. Krizek had unnecessarily treated his Medicare and Medicaid patients, the court did not find it necessary to presume that Dr. Krizek's treatment was medically unnecessary or that he performed such

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130. See *Wang*, 975 F.2d at 1420-21. Further, one of the goals of the FCA is to deter such fraud against the Government in the future. The deterrence factor is lost when you are talking about mistakes or negligence because it is hard to deter an accident. Deterrence usually only works if the person being deterred is aware of what he or she is doing and can avoid the negative result through his or her actions.

131. 859 F. Supp. 5 (D.D.C. 1994).

132. See *id.* at 6.

133. See *id.* at 7.

134. See *id.*

135. See *id.* at 8.

136. See *id.*

137. See *id.*

138. See *id.* at 12.

treatment in an attempt to defraud the Government.<sup>139</sup> Rather, the court gave deference to Dr. Krizek's justifications for the course of treatment, procedures and diagnoses that he followed.<sup>140</sup>

However, the court did find that Mrs. Krizek's sloppy billing errors amounted to knowingly presenting false claims under the FCA.<sup>141</sup> Thus, these sloppy billing errors led to false claims for payment in violation of the statute.<sup>142</sup> In making this determination, the court noted that "[t]hese were not 'mistakes' nor merely negligent conduct . . . . Rather[,] the defendants acted with reckless disregard as to the truth or falsity of the submissions."<sup>143</sup> The court found that, "[w]hile the Act was not intended to apply to mere negligence, it is intended to apply to situations . . . where the submitted claims to the government are prepared in such a sloppy or unsupervised fashion that . . . result[] in overcharges to the government."<sup>144</sup>

The court's ruling in *Krizek* is helpful in ferreting out what type of negligence reaches the level of reckless disregard as to the truth or falsity of the information—a false claim under the FCA, and what type of negligence does not reach this level—not a false claim under the FCA. While extreme sloppiness in billing practices can constitute such a reckless disregard, a doctor's billing of the federal government for services that he, in his professional judgment, felt were appropriate, is not a reckless disregard as to the truth or falsity of the information.<sup>145</sup> Rather, the court gives weight to the doctor's judgment, especially when the Government does not present enough evidence to the contrary.<sup>146</sup>

The second case that focuses on a specific application of the FCA is *United States ex rel. Rueter v. Sparks*.<sup>147</sup> This case also provides insight into resolving to the question whether medical malpractice can serve as a basis for a false claims cause of action under the FCA. The *Rueter* decision is informative because it further analyzes what courts require for proof in a false claims action and particularly what constitutes deliberate ignorance or reckless disregard.

William Rueter brought an action against Sparks & Wiewel Construction Company ("S & W") under the *qui tam* provision of the FCA alleging that S & W's method of billing the Government for a federally funded highway project

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139. See *id.* at 8. The Government's case was based solely on the Government's expert testimony after a "cold review of Dr. Krizek's notes for each patient." *Id.*

140. See *id.*

141. See *id.* at 13.

142. See *id.* at 13-14.

143. *Id.* at 13.

144. *Id.* at 24 (quoting *United States v. Entin*, 750 F. Supp. 512, 518 (S.D. Fla. 1990) (quoting 132 Cong. Rec. H 9389 (daily ed. Oct. 7, 1986) (statement of Rep. Berman))).

145. This is true regardless of whether the medical services were performed perfectly or not.

146. See *Krizek*, 859 F. Supp. at 8.

147. 939 F. Supp. 636 (C.D. Ill. 1996), *aff'd*, 1997 U.S. App. LEXIS 6151 (7th Cir. Mar. 27, 1997).



was false and fraudulent under the Act.<sup>148</sup> The billing errors, although not in compliance with federal law, were not known to or intended by S & W.<sup>149</sup>

The court found that the actions taken by S & W did not rise to the level of deliberate ignorance or reckless disregard and were not false claims under the FCA because S & W thought the billing procedure was consistent with the law.<sup>150</sup> S & W thought it was in conformity with the law because it had been using this billing method for twenty-five years.<sup>151</sup> In its decision, the court stated that "[a]t most, [S & W] was only negligent in this case" and, as discussed earlier, negligence is not a basis for a false claims action.<sup>152</sup>

The *Rueter* decision is informative because it further shows what proof the courts are looking for in a false claims action. The court was not as concerned that the Government was being improperly charged, but rather was concerned with S & W's intention when billing the Government. Just as the court did not feel that S & W was culpable due to its negligent mistakes, a doctor should not be culpable if his basis for billing the government was due to an honest belief that he provided a proper service, even if the service is later found to be the basis for a malpractice claim. A contrary result would be unfair to the doctor and would not serve the purpose of the FCA.

The third case that focuses on a specific area and application of the FCA and that is informative to the issue whether medical malpractice can serve as a basis for a false claims cause of action under the FCA is the Ninth Circuit case of *United States ex rel. Hopper v. Anton*.<sup>153</sup> The court in *Hopper* took the position that prosecution under the FCA is not the answer to any and all payments by the government for services that are not what they purport to be; the FCA's focus is more narrow.<sup>154</sup> Thus, *Hopper* gives insight into the general application of the FCA to any specific set of facts that are presented.

Sheila Hopper, a special education teacher, brought a *qui tam* claim under the FCA against the school district in which she worked.<sup>155</sup> She alleged that the school district was not in compliance with various regulations laid out by the California State Department of Education.<sup>156</sup> She further alleged that because the

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148. See *id.* 637.

149. See *id.* at 638. S & W billed the government the prevailing wage of \$18.00 per hour for eight hours a day on some days and seven hours a day for other days. The actual number of hours worked was seven and one-half hours a day, with one half-hour each day dedicated to machine maintenance. For time spent on machine maintenance, the workers were only paid \$8.00 per hour. S & W felt that these maintenance hours need not be included on the payroll record submitted to the government because the General Wage payroll form submitted did not provide a classification for such maintenance. See *id.* at 637-38.

150. See *id.* at 638-39.

151. See *id.* at 638.

152. *Id.*

153. 91 F.3d 1261 (9th Cir. 1996).

154. See *id.* at 1265-67.

155. See *id.* at 1264.

156. See *id.*

school district was not in compliance with these various regulations, its submission of requests for federal funding were false claims under the FCA.<sup>157</sup>

In deciding this case, the court held that the school district did not meet the knowledge requirement of the FCA merely because the school district was in violation of federal regulations.<sup>158</sup> Rather, the court found that violations of federal regulations, unless knowingly committed, are not actionable under the FCA.<sup>159</sup>

The court took the position, therefore, that prosecution under the FCA is not the answer to any and all payments by the government for services that are not exactly what they were supposed to be. This view is consistent with the argument that, simply because a Medicare or Medicaid patient fails to receive the expected level of medical care, does not lead to the conclusion that the doctor's bill constitutes a false claim. Rather, the FCA's focus is narrower and should be applied conservatively. The *Hopper* case, therefore, is yet another argument against allowing medical malpractice to serve as a basis for a false claims action.

#### IX. OPPOSING CASE LAW

Although there are many strong arguments with corresponding case law supporting the position that medical malpractice should not serve as a basis for a false claims cause of action under the FCA, two cases have indicated that such an application may be possible.<sup>160</sup>

In *United States ex rel. Aranda v. Community Psychiatric Centers of Oklahoma, Inc.*, the Government brought a false claims action against a psychiatric hospital alleging that the hospital did not take appropriate precautions to avoid "physical injury to and sexual abuse of patients."<sup>161</sup> This allegation was based on "inadequate conditions" at the hospital, "such as understaffed shifts, lack of monitoring equipment" over the patients, "and inappropriate housing assignments."<sup>162</sup> The district court in Oklahoma declined to hold that "these

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157. *See id.*

158. *See id.* at 1268.

159. *See id.* at 1265. The Ninth Circuit extensively quoted the district court and agreed that "[i]t appears to the court that the plaintiff is operating under a fundamental misconception as to the reach and scope of the FCA." *Id.* "[I]t is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA." *Id.* Rather, "[i]t requires a false claim . . . [S]ome request for payment containing falsities . . . must exist." *Id.* Finally, the Ninth Circuit agreed that "[t]his does not mean that other types of violations of regulations, or contracts, or conditions set for the receipt of moneys . . . are not remediable; it merely means that such are not remediable under the FCA." *Id.*

160. Neither of these cases, however, was decided by a high court and, thus, are not binding on any other courts. This issue has not been resolved by the Supreme Court.

161. 945 F. Supp. 1485, 1488 (W.D. Okla. 1996).

162. *Id.*

allegations, if proved, cannot form the basis of an FCA claim.”<sup>163</sup>

In *Mikes v. Strauss*,<sup>164</sup> the *qui tam* plaintiff brought a false claims cause of action under the FCA claiming that the defendants had regularly misused and overused spirometry and magnetic resonance imaging tests to overcharge Medicare and Medicaid for patient treatment. The court held that “[t]hese allegations are sufficient to demonstrate the existence of genuine issues of material fact regarding whether defendants made claims for payment to the government, whether these claims were false or fraudulent, and whether defendants conspired in their efforts to defraud the government.”<sup>165</sup>

The *Aranda* and *Mikes* decisions are the two leading cases supporting the argument that medical malpractice should be the basis for a false claims cause of action under the FCA. However, these cases were decided in federal district courts and, thus, have no binding authority except in those specific districts. In fact, the argument and cases on the opposite side of the issue show that the courts are split on the issue of whether medical malpractice should be a basis for a false claims action.

#### CONCLUSION

The FCA should not be used to help ensure that individuals who are provided government-funded health care receive quality health care. Particularly, it should not be used as an additional punishment of doctors who commit medical malpractice, above and beyond the penalties accessed by a victim’s normal civil malpractice claim. Although it is true that the Government likely did not intend to benefit those who give meaningless or improper treatment to patients, the Government did intend to benefit those doctors who are put in decision making positions and who treat patients based on their training. It does not seem fair or justified to punish a doctor, with the FCA, for making a professional judgment and acting on that judgment. This is especially true when any faulty decision that falls below a doctor’s standard of care will be punished with a civil malpractice claim. Thus, it does not seem logical or effective to label a doctor’s request for payment to the Government as false, even if it later turns out that he committed malpractice.

The crucial inquiry into whether a health care provider has performed malpractice is whether the provider’s treatment was reasonable when viewed against the prevailing standard of medical care for his or her profession and given his or her circumstances. Failing to meet this prevailing standard of care is not the equivalent of a reckless evaluation of the care provided or even deliberate ignorance in submitting a bill for that care as required by the elements of a false claims cause of action under the FCA. Much less, it is simply inconceivable that a doctor’s innocent professional mistake can constitute an intentional presentation of a false claim to the Government for payment.

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163. *Id.* at 1489.

164. 889 F. Supp. 746, 749 (S.D.N.Y. 1995).

165. *Id.* at 752.

In addition, a doctor should not be subjected to false claims liability based on a mere mistake, negligence or lack of insight. Such mistakes, negligence or lack of insight do not reach the level of immoral wrongdoings that the FCA sought to punish. Rather, a doctor's mistake is merely a scientific error or a negligent mistake, which is not a false claim. Further, one of the goals of the FCA is to deter fraud against the Government in the future. The deterrence factor is lost when mistakes or simple negligence occur because it is hard to deter an accident. Deterrence usually only works if the person being deterred is aware of what he or she is doing and can avoid the negative result through his or her actions.

For the above reasons, it is inconceivable that medical malpractice could serve as a basis for a false claims cause of action under the FCA. Not only is such an application of the FCA unreasonable and illogical, it is not what Congress intended.



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